

Chapter 3

The Depository Relationship

As Justice William O. Douglas once observed, "The banking transactions of an individual give a fairly accurate account of his religion, ideology, opinion, and interest"¹ Moreover, the emergence of a checking account as an economic and social diary for many individuals is one reason why commercial banks are acutely aware of the need to keep their clients' financial affairs confidential. Yet, as noted in Chapter 1, the Supreme Court, in *U.S. v. Miller*,² recently rejected the notion that such expectations of confidentiality are either warranted or legally enforceable.

The Supreme Court decision comes at a time when electronic funds transfer services, and other developments in personal-data record keeping, promise far-reaching consequences for the type of individually identifiable documentation entrusted to depository institutions. For these among many reasons, the Commission felt compelled to examine the record-keeping practices of depository institutions and to reexamine the assumptions underlying depository practices.

DEPOSITORY INSTITUTIONS

Depository institutions—that is, commercial banks, savings and loan associations, mutual savings banks, and credit unions—are financial intermediaries³ acting as go betweens for suppliers and borrowers of money and for payers and payees. In simplest terms, when an individual deposits his money with such an institution, the institution becomes his agent and the records resulting from the relationship exist primarily to document transactions. For example, when an individual writes a check, the bank pays on the basis of that order. The check is the individual's instruction to the bank and provides an accounting to protect both the individual and the depository institution.

Americans have long thought that the details of an individual's financial affairs are nobody's business but his own unless he chooses to reveal them. The record-keeping policies and practices of depository institutions visibly reflect this view. Depository institutions testified that

¹ *California Bankers Association v. Shultz*, 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974).

² *United States v. Miller*, 425 U.S. 435 (1976).

³ Written statement of First National City Bank (Citibank), *Credit-Card Issuers and Reservations Systems*, Hearings before the Privacy Protection Study Commission, February 11, 1976, p. 13. (Hereinafter cited as "Credit-Card Issuers Hearings.")

they are cautious in responding to inquiries concerning even the mere existence of an account.⁴ The number of institutions that have self-imposed policies for notifying individuals when government agencies are seeking account information further indicates their concern. Nonetheless, information about depositors is available for purposes other than accounting. New banking services, such as overdraft protection for checking accounts⁵, and concern about fraud contribute to data availability. The demands of governmental agencies responsible for regulatory oversight, law enforcement, welfare administration, and other public-sector programs also affect the level of disclosure by depository institutions.

The proliferation of personal banking service records parallels the phenomenal growth of open-end consumer credit⁶ over the past several decades. As a consequence, commercial banks keep a much broader range of transactions for a significantly larger population than they did only a few years ago. The combined increase in personal checking accounts and penetration of the open-end credit market described in Chapter 2 has made commercial banks major repositories of information about the activities and relationships of millions of people.

Commercial banks have begun to market services that guarantee the availability of funds to the recipient of a check. Such authorization, or "check-guarantee," services protect the depositor against having his personal checks refused by retailers, and protect the retailer against loss from forged checks and from checks returned because there are not sufficient funds in an otherwise legitimate account. These services create a new type of economic risk for depository institutions, making them more selective—and more inquisitive—about applicants for checking accounts. For the individual, the process of applying for these new types of depository services, in some instances, resembles the process of applying for open-end consumer credit,⁷ and applications for ordinary checking accounts are now being declined at times on the basis of information provided by independent check-guarantee services and credit bureaus.

In response to the increasing frequency of fraudulent and overdraft checks written during the past decade, other types of institutions have also developed services for guaranteeing checks. They are functionally similar to the independent credit-card authorization services discussed in the preceding chapter and basically maintain information on individuals who have fraudulently used checks or have outstanding unpaid checks. Such institutions also may keep a log of check-writing activity for a brief period to be

⁴ Written statement of Continental Illinois National Bank and Trust Company of Chicago, *Depository and Lending Institutions*, Hearings before the Privacy Protection Study Commission, April 21, 1976, p. 5 (hereinafter cited as "Depository and Lending Institutions Hearings"); also, written statement of Bayview Federal Savings and Loan Association, *Depository and Lending Institutions Hearings*, April 22, 1976, pp. 5-6; and, written statement of Credit Union National Association, *Depository and Lending Institutions Hearings*, April 21, 1976, p. 8.

⁵ "Overdraft protection" is a pre-established line of credit to assure that a checking account does not get overdrawn.

⁶ For a discussion of this growth, see Chapter 2.

⁷ See Chapter 2.

able to report to subscribers the total number and amount of checks written by an individual on whom an inquiry is made.

An independent check-guarantee service may verify that an individual does not have any outstanding checks for which payment was refused by the individual's bank; or the service may guarantee, or insure, that the check will be honored. If the individual's bank refuses payment, the service will meet the obligation and then collect the funds directly from the individual.

It should be noted that a check-guarantee service can combine in one organizational framework functions normally associated with depository institutions, insurers, credit bureaus, collection agencies, and credit-card authorization systems.⁸ The development of these multifaceted services illustrates how traditional relationships between individuals and institutions can blur in the coming decades. Although it may be premature to address such matters, the Commission believes that the President and the Congress should be attentive to the long-term effects they may have on individuals. At the very least, future framers of protective legislation will be faced with a new set of definitional problems.

THE BANK SECRECY ACT OF 1970

The Currency and Foreign Transactions Reporting Act of 1970, the so-called "Bank Secrecy Act,"⁹ requires depository institutions to retain certain records on individuals and to report certain types of financial transactions to the Federal Government. The law was enacted largely in response to a concern over the use of secret foreign bank accounts to evade American laws. At the same time, however, Congress also recognized that the required records could be helpful to many law enforcement, regulatory, and tax administration authorities. Government agencies came to view the Bank Secrecy Act as a kind of insurance policy, guaranteeing that copies of checks and certain other documentation would be available if needed.

Bankers and civil libertarians have challenged the Act on the grounds that it raises fundamental questions about the confidential relationship between depository institutions and their customers and the relationship between government and citizens in a free society.¹⁰ While the Commission addresses these concerns in Chapter 9, the Act is discussed here only as it affects the record-keeping practices of depository institutions.

⁸ See written statement of Telecredit, Inc., *Credit Reporting and Payment Authorization Services*, Hearings before the Privacy Protection Study Commission, August 5, 1976. (Hereinafter cited as "Credit Reporting Hearings.")

⁹ 31 U.S.C. 1051-1122

¹⁰ *Amend the Bank Secrecy Act*, Hearings before the Subcommittee on Financial Institutions of the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 92d Congress, 2d Session, 1972; *The Effect of the Bank Secrecy Act on State Laws*, Hearings before the Subcommittee on Financial Institutions of the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, 93d Congress, 2d Session, 1974; *Bank Failures, Regulatory Reform, and Financial Privacy*, Hearings before the Subcommittee on Financial Institutions of the Committee on Banking, Currency, and Housing, U.S. House of Representatives, 94th Congress, 1st Session, 1975.

The regulations issued by the Treasury Department¹¹ pursuant to the Bank Secrecy Act can be divided into four categories: (1) those pertaining to the record-keeping practices of banks and other financial institutions; (2) those requiring reports of currency transactions, foreign financial accounts, and the international transportation of monetary instruments; (3) those requiring financial institutions to verify the identity of their customers; and (4) those requiring persons having foreign financial accounts to report them to the government and to maintain records on them.

The first category requires banks, savings and loan associations, securities brokers, dealers in foreign currency, agents of foreign banks, and certain other financial institutions to retain the original or a copy of a record of each extension of credit in excess of \$5,000 (except for credit secured by real estate), and the original or a copy of a record of each instruction given or received concerning the transmission out of the United States of more than \$10,000 in credit, funds, currency, or other monetary instruments, checks, or securities. [31 C.F.R. 103.33]

A bank or other similar institution, such as a savings and loan association, credit union, or agent of a foreign bank must also retain a copy of the following: (1) documents granting signature authority over each deposit or share account; (2) account statements; (3) checks and other charges in excess of \$100 that are posted to accounts (only checks drawn on certain high-volume accounts are exempt); (4) each check or other item in excess of \$10,000 transmitted outside the United States; (5) each check or draft in excess of \$10,000 drawn on or issued by a foreign bank which is paid by the domestic bank; (6) each check in excess of \$10,000 received directly from a foreign financial institution; (7) records of each receipt of currency, other monetary instrument, securities, checks, or credit received from a foreign financial institution; and (8) records necessary to reconstruct a checking account and to furnish an audit trail for each transaction over \$100. [31 C.F.R. 103.34(b)]

The Securities and Exchange Commission regulated the record keeping of securities brokers long before the Treasury Department issued its regulations implementing the Bank Secrecy Act. The Treasury regulations, however, added the requirement that the brokers obtain a signature card or similar document establishing trading authority over an account, and that they make a reasonable effort to obtain a Social Security number for each account. [31 C.F.R. 103.35]

One of the reporting requirements that affects the record-keeping practices of private financial institutions is only a modification of the longstanding requirement, in effect for more than 25 years, that financial institutions report to the Internal Revenue Service (IRS) any unusual domestic currency transaction involving more than \$2,500. The new regulation raises the threshold amount from \$2,500 to \$10,000, and adds a penalty for willful failure to report. [31 C.F.R. 103.32, .25(a), .47, .49]

A new reporting requirement mandates reports on the international transportation of currency and certain monetary instruments in excess of

¹¹ 31 C.F.R. 103.

\$5,000. A traveller carrying that amount with him must file a report with the U.S. Customs Service when he enters or leaves the United States. If the amount is transported in some other manner, a report must be filed with Customs before the monetary instrument enters or leaves the country. Conversely, a United States resident who receives \$5,000 or more from overseas must file a report within 30 days after the money arrives. [31 C.F.R. 103.23, .24(b)]

Another reporting requirement of interest actually went into effect before Treasury issued its regulations. On the 1970 Federal income tax return, the IRS included a question concerning the ownership or control of foreign financial accounts and required any person who had such an account to file a separate schedule describing it. Under Treasury's regulation, such persons are also required to retain certain specified records of the account.

The precept "know your customer" is widely accepted in financial circles. The Treasury regulations reinforce it by requiring financial institutions to verify and record the identity of any person for whom they handle a reportable transaction, and by specifying minimum identification procedures. The identity of someone who is not a depositor may be verified by examining a driver's license, passport, or other document normally accepted as positive identification, but financial institutions must also make a reasonable effort to obtain a Social Security number or other taxpayer identification number for each entity identified with a deposit account.

Checks and other charges in excess of \$100 must be microfilmed and retained for five years. The \$100 minimum was supposed to exempt the vast majority of checks written by individuals, but selecting out checks in excess of \$99 has proved so expensive that most banks microfilm all checks.¹²

THE SERVICE ROLE OF FEDERAL FINANCIAL REGULATORS

The fact that some financial regulatory agencies provide information-processing services for those they regulate distinguishes the depository area from other spheres of government regulation. The Federal Communications Commission, for example, does not provide the common-carrier facilities through which broadcasting networks distribute their programs, nor do State Insurance Commissioners operate computers for processing insurance companies' claims. In banking, however, Federal Reserve District Banks and Federal Home Loan Banks both provide important, though fundamentally different, record-keeping services for commercial banks and savings and loan associations.¹³

Since 1913, the Federal Reserve District Banks have cleared checks among the nation's commercial banks. Although they do not clear all checks, their services play a significant role in the movement of money from

¹² Written statement of American Bankers Association, Depository and Lending Institutions Hearings, April 22, 1976.

¹³ Written statement of Board of Governors of the Federal Reserve System Staff, Depository and Lending Institutions Hearings, April 22, 1976; written statement of Federal Home Loan Bank Board Staff, Depository and Lending Institutions Hearings, April 22, 1976.

one part of the country to another. For years, this payments mechanism has depended on the physical movement of paper, with millions of individually documented transactions flowing through it every day. Concern over confidentiality was seldom expressed, since the paper glut alone was expected to protect an individual depositor's anonymity. However, changes in the form of such transfers to include electronically recorded entries, as discussed later in this chapter, have begun to undermine confidence in the continued preservation of confidential transactions as they pass through the Federal Reserve System.

Because savings and loan associations lack the payment powers of commercial banks, their record keeping does not usually cover transfers of funds among institutions, and thus is significantly less complicated than that of the commercial banks. Certain Federal Home Loan Banks, however, operate data-processing facilities as a service to savings and loan associations that are too small to support a data-processing facility of their own or are inconveniently far from a commercial data-processing service bureau.

The Commission has paid particular attention to the service role of these Federal financial regulators because of its concern with a continued public presence in the development and operation of electronic funds transfer services. The basis for this concern and the Commission's recommendation with respect to it is set forth in a later section of this chapter. First, however, the specific problems posed by the record-keeping practices of depository institutions today must be considered along with the Commission's recommendations with respect to them.

RECOMMENDATIONS

In contrast to the consumer-credit relationship, the depository relationship is not regulated with respect to determining eligibility for services and to use of third parties for information to make decisions about such eligibility. However, the introduction of new depository services involving economic risk for depository institutions, coupled with the *Miller* decision's effect on the confidential status of depository records, have persuaded the Commission that this lack of clear rights and responsibilities is undesirable for both depository institutions and their customers; the recommendations that follow reflect this conclusion.

The Commission's recommendations are presented in terms of its three recommended public-policy objectives: (1) to minimize intrusiveness; (2) to maximize fairness; and (3) to create a legitimate, enforceable, expectation of confidentiality.

GOVERNMENTAL MECHANISMS

Because of the greater risk banks assume when they offer check-guarantee services and append lines of credit to depository accounts, individuals can no longer count on getting a bank's depository services even if they apply with cash in hand. Although the evaluation of an individual

who applies for a depository service does not appear to be as complex or as extensive as it is when he applies for consumer credit, there are parallels.

The Equal Credit Opportunity Act, as amended,¹⁴ curbs the collection of some information about individuals by consumer-credit grantors, but depository institutions are under no such constraint. However, the Commission found no evidence that depository institutions collect items of information which could be considered excessively intrusive, and for this reason finds it unnecessary to recommend that governmental mechanisms should exist for individuals to question the propriety of information collected or used by depository institutions, or to bring such objections to the attention of bodies responsible for public policy. The need for such mechanisms may arise in the future, and the Commission suggests continued attention to developments bearing on the intrusiveness issue.

REASONABLE CARE IN THE USE OF SUPPORT ORGANIZATIONS

Because of the similarity between applying for some new types of depository services and for open-end consumer credit, and because, as noted earlier, an independent check-guarantee service can combine functions normally associated with insurers, credit bureaus, collection agencies, credit-card authorization systems, as well as depository institutions, the Commission believes that implementation of its recommendations regarding depository institutions will be enhanced considerably if depository institutions have a strong incentive to assure that the activities of their support organizations are proper. Hence, the Commission recommends:

Recommendation (1):

That the Federal Fair Credit Reporting Act be amended to provide that a depository institution must exercise reasonable care in the selection and use of credit bureaus, independent check-guarantee services, and other support organizations, so as to assure that the collection, maintenance, use, and disclosure practices of such organizations comply with the Commission's recommendations.

If it could be shown that a depository institution contracted for or used the services of a support organization with knowledge, actual or constructive, that the organization had been engaging in illegal practices, an individual, the Federal Trade Commission, or other appropriate enforcement agency could initiate action against both the depository institution and the support organization and hold them jointly liable for the support organization's actions.

¹⁴ 15 U.S.C. 1691 *et seq.*

Fairness

FAIRNESS IN COLLECTION

NOTICE REGARDING COLLECTION FROM THIRD PARTIES

Although the Commission believes that there is currently no need for governmental mechanisms to question the propriety of information collected or used by depository institutions, the individual's participation in striking a balance between the amount of information he must divulge about himself and the service he expects in return does need to be strengthened. Thus, the Commission recommends:

Recommendation (2):

That Federal law be enacted or amended to provide that when an individual applies for a depository service, a depository institution must notify the individual of:

- (a) the types of information expected to be collected about him from third parties and that are not collected on the application; and**
- (b) the types of institutional sources that are expected to be asked to provide information about him.**

The recommended measure, like the parallel measure recommended for consumer credit, ensures that the individual will be told the scope of an inquiry before agreeing to it. The usual institutional sources to be queried are the individual's employer and the depository institutions with which he has or once had a relationship. The emergence of independent check-guarantee services and the new reliance on credit bureaus introduce additional institutional sources, and this recommendation also applies to them.

The Commission believes that this recommendation can best be implemented by giving additional authority to the Federal Reserve Board to supplement similar regulatory authority it now has under the Truth-in-Lending, Equal Credit Opportunity, and Fair Credit Billing Acts. The resulting Federal Reserve Board regulations could then be enforced both by the enforcement agencies with authority over particular depository institutions, and by the individual as currently provided in the Truth-in-Lending Act which allows an individual to seek damages for violation of standards promulgated by the Board either on his own behalf, or on behalf of a class.

NOTICE AS THE COLLECTION LIMITATION

The Commission is concerned that a depository institution's practices and those of its support organizations conform with the individual's expectations pursuant to *Recommendation (2)*. Therefore, the Commission recommends:

Recommendation (3):

That Federal law be enacted or amended to provide that a depository institution must limit:

- (a) its own information collection practices in connection with an application for a depository service to those specified in the notice called for in *Recommendation (2)*; and
- (b) its request to any organization it asks to collect information on its behalf to information and sources specified in the notice called for in *Recommendation (2)*.

Recommendation (3) should be implemented in conjunction with *Recommendations (1)* and *(2)*. Its purpose is to make clear that both the depository institution and any organization the depository institution utilizes to collect information on its behalf are equally subject to the limitations implicit in the notice called for in *Recommendation (2)*.

FAIRNESS IN USE

ACCESS TO DEPOSITORY RECORDS

An individual needs a right of access to records about himself compiled for the purpose of making depository decisions just as he needs it for other decisions about him. The need grows more urgent as depository institutions depend on information from third parties, such as independent check-guarantee services. Without such access, the individual has no control over the accuracy and completeness of the information that is used, and has no way of discovering errors or other inaccuracies in the information another institution has provided. Thus, the Commission recommends:

Recommendation (4):

That Federal law be enacted or amended to provide that an individual shall have a right to see and copy, upon request, all recorded information concerning him that a depository institution has used to make an adverse depository decision about him.

The recommendation recognizes the individual's right of access only to the records about himself which enter into an adverse decision. In the adverse decision situation, the individual is affected by information that does not stem from transactions directly related to the depository account. The Commission recognizes that an individual presently receives copies of records with respect to his depository account on a periodic basis, usually in the form of monthly statements and cancelled checks or receipts for deposits and withdrawals. The implementation of this recommendation is discussed under *Recommendation (5)* below.

ADVERSE DEPOSITORY DECISIONS

The Commission has concluded that a depository institution should be

obligated to explain its adverse decisions to the affected individuals. Unlike credit grantors, depository institutions have no procedures for fulfilling this obligation, and neither the Fair Credit Reporting Act nor the Equal Credit Opportunity Act applies to decisions denying an individual a depository service. Therefore, the Commission recommends:

Recommendation (5):

That Federal law be enacted or amended to provide that a depository institution must:

- (a) disclose in writing to an individual who is the subject of an adverse depository decision:**
 - (i) the specific reason(s) for the adverse decision;**
 - (ii) the specific item(s) of information, in plain language, that supports the reason(s) given pursuant to (a)(i);**
 - (iii) the name(s) and address(es) of the institutional source(s) of the item(s) given pursuant to (a)(ii); and**
 - (iv) the individual's right to see and copy, upon request, all recorded information pertaining to him used to make the adverse decision; and**
- (b) inform the individual of his rights provided by the Fair Credit Reporting Act, when the decision is based in whole or in part on information obtained from a credit bureau or independent check-guarantee service.**

The value of *Recommendation (5)* will be more apparent as depository institutions become more selective in opening depository accounts. Inequities stemming from the fact that no law now allows an individual easily to learn the reasons for an adverse decision, the information items behind those reasons, or the identity and whereabouts of institutional sources are discussed extensively in the preceding chapter. The inclusion of independent check-guarantee services in subparagraph (b) assumes the adoption of *Recommendation (6)*, below.

Recommendations (4) and (5) could be implemented either through amendment of the Fair Credit Reporting Act or the banking laws. An individual should be able to sue in Federal court or another court of competent jurisdiction if the depository institution fails to perform. This right should include the right to sue for failure to state specific reason(s) for a specific decision where the individual has cause to believe that the reason is other than the one(s) stated by the depository institution. The court should have the power to order the depository institution to comply and to award attorney's fees and court costs to any plaintiff who substantially prevails. If it could be shown that the credit grantor willfully or intentionally denied the individual any of the rights *Recommendations (4) and (5)* would give him, the court should have the power to award up to \$1,000 to the individual.

Systematic denials of access by depository institutions could be subject to enforcement by the Federal Trade Commission and other agencies¹⁵ that currently have enforcement authority under the Fair Credit Reporting and Equal Credit Opportunity Acts. The remedy would be an order directing a depository institution to disclose records upon request. Once the FTC or other agency issued such an order, the depository institution would then be subject to the usual statutes available to enforce such orders.

The burden should be on the individual to reasonably describe the documents sought and the depository institution should be able to defend itself on the basis that it could not reasonably locate or identify them. For example, an individual could sue for disclosure to him of any document developed as a result of an application for a depository service if the individual could reasonably identify the date and nature of the application. If, however, an individual requested any information that relates to him in a file, and could not identify, with some specificity, the circumstances pursuant to which such a file was developed, the depository institution would not be under any affirmative obligation to search every record to locate a possible passing reference to the individual.

REGULATION OF INDEPENDENT CHECK-GUARANTEE SERVICES

Independent check-guarantee services are arguably excluded from the Fair Credit Reporting Act because they do not influence credit or other decisions, such as employment and insurance. The Commission finds, however, that independent check-guarantee services affect individuals in the same way as do credit bureaus and inspection bureaus. The Federal Trade Commission staff has advised independent check-guarantee services that they *are* subject to the provisions of the FCRA, but this interpretation lacks the force of law. The Commission believes that the law should explicitly cover independent check-guarantee services, exempting them only from those FCRA requirements that are not appropriate. Therefore, the Commission recommends:

Recommendation (6):

That the Federal Fair Credit Reporting Act be amended to provide that an independent check-guarantee service shall be subject to all requirements of the Act, except the requirement to disclose corrected information to prior recipients upon completion of a reinvestigation of disputed information.

The rationale for the exception in this recommendation is the same as the rationale for the exception in *Recommendation (9)(b)* in the previous chapter on credit grantors and independent authorization services—namely, that once an error in an independent check-guarantee service record is

¹⁵ Under the pertinent provisions of the FCRA [15 U.S.C. 1681s(b)] and the ECOA [15 U.S.C. 1691c(a) & (c)], twelve agencies have some administrative enforcement responsibility, ranging from traditional financial regulators such as the Federal Reserve Board to agencies such as the Civil Aeronautics Board and the Department of Agriculture.

discovered, the damage has already been done and usually cannot be remedied. Hence a requirement that previous recipients be notified of any corrections would, in most, cases, be gratuitous. If an independent check-guarantee service fails to meet the requirements called for in *Recommendation (6)*, it should be liable for actual damages in the event an individual is harmed by its failure.

INACCURATE REPORTS TO INDEPENDENT CHECK GUARANTEE SERVICES

The subscribers of an independent check-guarantee service are its principal sources of information. The subscriber list of Telecredit, Inc., the nation's largest check-guarantee service, includes automobile dealers, airlines, hotels, gasoline stations, commercial banks, department stores, car-rental agencies, and other retailers across the country. Other fruitful sources of information, less frequent but not less significant, are law enforcement agencies that track down stolen and forged checks.¹⁶ Thus, an independent check-guarantee service's sources of information can be as diverse as those of credit bureaus.

The consequences of having one's name and identification adversely reported to an independent check-guarantee service are clear and certain; a subscriber to the service will not honor your check. The Commission is concerned about errors that may occur and the unfairly preemptive actions that they can cause. Accordingly, the Commission recommends:

Recommendation (7):

That the Federal Fair Credit Reporting Act be amended to provide that if a contributor learns it has incorrectly reported an individual to an independent check-guarantee service, it must notify the check-guarantee service within a reasonable period of time so that the service can correct its files.

As with *Recommendation (6)*, a contributor that incorrectly reports an individual to an independent check-guarantee service and fails to correct the error after it is discovered should be liable for actual damages in the event that an individual is harmed by its failure to do so.

Expectation of Confidentiality

CONFIDENTIALITY OF DEPOSITORY RECORDS

As with other confidential relationships, an individual's expectation of confidentiality in his depository relationship can be at best impressionistic unless a depository institution apprises him of its disclosure policies. Further, it must again be emphasized that an individual currently has no legally recognized interest in the records maintained about him by a depository institution and therefore cannot prevent a disclosure of them that may be inimical to him. Thus, the Commission recommends:

¹⁶ Written statement of Telecredit, Inc., Credit Reporting Hearings, August 5, 1976.

Recommendation (8):

That Federal law be enacted to provide:

- (a)** that a depository institution must notify an individual with whom it has or proposes to have a depository relationship of the uses and disclosures which are expected to be made of the types of information it collects or maintains about him; and that with respect to routine disclosures to third parties which are necessary for servicing the depository relationship, the notification must include the specific types of information to be disclosed and the types of recipients;
- (b)** that information concerning an individual which a depository institution collects to establish or service a depository relationship, as stated in the notification to the individual called for in (a), must be treated as confidential by the depository institution; and thus any disclosures to third parties other than those necessary to service the depository relationship must be specifically directed or authorized by the individual, or in the case of marketing information, specifically described in the notification;
- (c)** that an individual must be considered to have a continuing interest in the use and disclosure of information a depository institution maintains about him, and must be allowed to participate in any use or disclosure that would not be consistent with the original notification, except when a depository institution discloses information about an individual in order to prevent or protect against the possible occurrence of fraud; and
- (d)** that any material changes or modifications in the use or disclosure policies of a depository institution must be preceded by a notification that describes the change to an individual with whom the depository institution has an established relationship.

In addition to enacting the recommendation, the statute should give the Federal Reserve Board regulatory authority similar to the regulatory authority it now has under the Truth-in-Lending, Equal Credit Opportunity, and Fair Credit Billing Acts. The resulting Federal Reserve regulations could then be enforced both by the enforcement agencies having authority over particular depository institutions, and by the individual, as currently provided in the Truth-in-Lending Act, which allows an individual to seek damages for violation of standards promulgated by the Board, either on his own behalf or on behalf of a class.

ELECTRONIC FUNDS TRANSFER SERVICES

The phrase Electronic Funds Transfer (EFT) includes several related techniques for processing and documenting deposits, withdrawals, and transfers of money with the aid of computers and telecommunications. Point-of-sale services and Automated Clearing House (ACH) Services are

currently prominent examples. Variations in EFT services depend largely on the size and type of depository institution, the regularity of the payments to be processed, the purpose and complexity of the financial transaction, regulatory and other legal restraints, and the willingness of consumers to indulge business and governmental institutions in their search for new financial services.

Point-of-sale services are probably the form of EFT most visible to the individual. They offer the individual a convenient way to use the funds he has on deposit without having to visit the depository institution or draw a check or draft on his account. Some point-of-sale services simply allow the withdrawal of funds, as for example, when an individual receives cash at a supermarket and purchases his groceries with the cash. More sophisticated services allow the individual, at the location and time of purchase, to move funds electronically from his account to the merchant's account in exchange for goods or services that he would otherwise pay for with cash, check, or credit.

The information-processing technology necessary for providing point-of-sale services is similar in many respects to that used extensively by credit-card issuers. The ubiquitous plastic card has been borrowed from the credit-card world and enhanced with a *personal identification number*, a unique number known only to the account holder and his financial institution and intended to safeguard against unauthorized transfers of funds. Point-of-sale services depend on telecommunications and computer systems in the same manner as credit-card issuers use them for authorizing transactions, transmitting information among various institutions, and keeping track of credits and debits.¹⁷ If a point-of-sale service involves many combinations of merchants and financial institutions, switches route each transaction to the appropriate financial institution, a technology also employed successfully by the two national bank-card associations.¹⁸ In light of many existing credit-card systems, it seems that the novelty of most point-of-sale services for the individual will be a new way to make withdrawals of deposited funds. Point-of-sale services may eventually involve all types of depository institutions, i.e., commercial banks, savings and loan associations, mutual savings banks, and credit unions. However, to understand how these services work, one need only look at their impact on commercial banks and savings and loan associations.

Commercial banks have long offered their customers convenient access to deposits by means of checking accounts.¹⁹ Checking accounts,

¹⁷ Written statement of Dee W. Hock, President, National BankAmericard, Inc., and John H. Reynolds, President, Interbank Card Association, Credit-Card Issuers Hearings, February 11, 1976.

¹⁸ As the following passage emphasizes, the techniques that make electronic exchange possible have been utilized quite successfully for bank-card operations: "EFT is emerging and coming fast . . . Much has been learned in processing credit cards that will be useful in electronic funds transfer systems. Pre-authorized credits, sales authorization and interchange will be necessary." Western States Bankcard Association, *Annual Report 1975*, p. 1.

¹⁹ Uniform Commercial Code § 3-108. See *Independent Bankers' Association of America, et al. v. Smith*, Doc. No. 75-0089 (D.C. Cir., March 23, 1976).

however, have two main drawbacks. For the banks, there is the cost of processing a glut of paper;²⁰ and for the individual, there is the reluctance of merchants to accept personal checks, a reluctance which has been rising with the number of fraudulent and overdraft checks.²¹ Point-of-sale services promise to reduce both drawbacks. For some commercial banks, check-authorization services are a first step toward developing the computer and telecommunications capability necessary for a mature point-of-sale service.²² Consumer acceptance will, however, determine how far such services can go in eliminating personal checks.²³

Savings and loan associations and other thrift institutions ordinarily lack the payment powers necessary to offer their customers the convenience of checking accounts.²⁴ Point-of-sale services give them a way of overcoming this obstacle. One observer of EFT developments summarized this transformation of savings and loan accounts as follows:

Electronic technology confuses payment powers limitations as well as doing away with the necessity of creating a negotiable instrument for purposes of conveying payment orders from account holder to financial institution. As a result, the technologies present two intriguing options to users. The account holder can turn any account into a "payment account" by dealing in cash if machines are strategically and conveniently located, or the account holder could, by electronically ordering the institution to do the paying for him by appropriate debits and credits to accounts, eliminate the use of cash or paper²⁵

Automated Clearing House services also transfer funds electronically. Their principal purpose as presently constituted is to effect debits and credits of a recurring nature between institutions; for example, payrolls, insurance premiums, social security benefits, and payments for utilities and mortgages. The main differences between point-of-sale services and ACH services, now and for the foreseeable future, are in the type of transactions processed, details of processing, and institutional control over the systems.

²⁰ In 1970, an estimated 21.5 billion checks were written on demand deposit accounts in commercial banks in the United States. Approximately one billion additional checks were written by the Federal government. It has been estimated that the total cost to society of the check payment system is \$10 billion annually. See Arthur D. Little, *The Consequences of Electronic Funds Transfer: A Technology Assessment of Movement Toward a Less Cash/Less Check Society*, Chapter 4, June 1975.

²¹ Written statement of Telecredit, Inc., Credit Reporting Hearings, August 5, 1976, p. 1.

²² Written statement of First National City Bank (Citibank), Credit-Card Issuers Hearings, February 11, 1976, p. 2; also, written statement of Continental Illinois Bank and Trust Company of Chicago, Depository and Lending Institutions Hearings, April 21, 1976, pp. 2-5.

²³ For some thoughtful comments concerning EFT from the consumer's perspective, see Peter H. Shuck, "Electronic Funds Transfer: A Technology in Search of a Market," *Maryland Law Review*, Volume 35, Number 1, 1975.

²⁴ The major exception to this general rule is the negotiable order of withdrawal (NOW) account. The orders of withdrawal are negotiable instruments but draw on interest-bearing accounts rather than demand deposits. Some States, such as New York, have granted checking-account powers to State-chartered thrift institutions.

²⁵ Stephen M. Ege, "Electronic Funds Transfer: A Survey of Problems and Prospects in 1975," *Maryland Law Review*, Volume 35, Number 1, 1975.

Typical ACH transactions are recurring pre-authorized transfers between institutions, as when social security recipients have their benefits deposited directly into their bank accounts each month. Such services arguably offer the most efficient, cost-effective, and convenient method of processing the innumerable government and commercial transactions that must be repeated regularly on fixed schedules. Telecommunications have not been essential to ACH operations in their early stages of development because each debit and credit does not need an authorization, as in point-of-sale services, nor does it need to be posted instantaneously to an account. However, ACHs across the country are being linked together by telecommunications to facilitate interregional exchange.²⁶

Institutional control over ACH services differs from institutional control over point-of-sale services in that Federal Reserve district banks operate the computer and communications facilities used by all but two of them. To a large extent, Federal Reserve district banks also determine pricing of ACH services and liability for errors. *Most significant from the personal privacy viewpoint, the Federal Reserve System, which acts as a fiscal agent of financial institutions and the Treasury Department in some respects, is not constrained by either its government or its commercial clients, much less by any individual bank client, from disclosing information about a bank customer's account to other government agencies.*²⁷

IMPACT OF ELECTRONIC FUNDS TRANSFER ON FINANCIAL RECORDS

Commercial banks and savings and loan associations presently stand at the threshold of a vast development in point-of-sale services. Significant effects of such development on institutional record keeping are clearly predictable based on experiences with credit cards. Expansion undoubtedly means that: (1) information about individuals recorded by financial institutions will include more details than otherwise required; (2) the records will become more centralized and the details will be more easily retrieved than they are now; and (3) financial records will expand to include items of information not ordinarily considered payment data.

It is important to note that the increased scope of the records generated by EFT may well include more than simply information necessary to transfer funds. Indeed, there are pressures which could eventually transform EFT systems into generalized information transfer systems. In the commercial environment, for example, accounting and administrative data will probably flow with various recurring payments; e.g., related benefit and tax withholding information could accompany wage

²⁶ "NACHA/Federal Reserve Set Plans for Nationwide ACH 'Pilot' Exchange, Action Expected to Stir Concern as Implications Unfold," *Payment Systems Action Report*, Volume 1, Number 6, July 26, 1976.

²⁷ Submission of Board of Governors of the Federal Reserve System Staff, Depository and Lending Institutions Hearings, April 22, 1976, p. 4. Part 261.6(b) of the Board's Rules regarding availability of information provides for the release of reports or examination of banks "to other agencies of the United States for use where necessary in the performance of their official duties." In Part 261.7 of its Rules, the Board has established procedures for responding to duly issued subpoenas.

payments. Consumer transactions are likely to relay information concerning the purpose of the transaction along with essential payment data to payee and payer alike. While such developments are not inevitable, the pressures to move in this direction are high. The economic incentives to combine payment and administrative information are great from both payer and payee point of view. It would eliminate the need for a great deal of paper documentation or the need for a duplicate information transfer system. Given the emergence of an increasingly competitive market for financial services and the potential cost savings for public and private institutions alike, there would seem to be little reason for providers of EFT services to refuse to accept the additional information flow.

For savings and loan associations, point-of-sale services also expand both the number and content of the records they keep and make the recorded information more readily available. The number grows because customers who no longer have to visit their savings and loan association in order to make a withdrawal or deposit will use their accounts more often, and each use generates a record. The content will grow because a point-of-sale transaction at, say, a supermarket requires that the record of that transaction be expanded to include at least the identity of the supermarket, and probably the time, date, and location of the transaction; the record may also expand further to include a description of items purchased. Finally, point-of-sale services will increase reliance on sophisticated information technologies, in many cases altering the form in which information is recorded and stored, and easing retrieval of it by those who control access to it. The great preponderance of savings and loan associations already have terminal-oriented computer systems, and point-of-sale services will simply further this trend. For savings and loan associations not currently automated, however, point-of-sale services will generate electronic records where none currently exist.²⁸

With commercial banks, point-of-sale development is not likely to expand appreciably either the number of records they keep or the content of their records, since records of checking services contain much of the necessary point-of-sale information. Clearer descriptions of transactions may be needed for verification by the consumer, but the data base maintained for a checking account is probably adequate for point-of-sale purposes.

Commercial banks have already invested heavily in information technology for processing the volume of paper generated by checking accounts; the main difference made by adding point-of-sale services will be to increase substantially the uses commercial banks can make of them. New point-of-sale services will further decrease the banks' reliance on paper, as their permanent records come to include a higher fraction of electronic records of point-of-sale transactions and a lower one of microfilmed checks. Since it is far quicker and easier to search and retrieve information from electronic records than from voluminous paper documentation and microfilm, the utility of an information base that is already recognized as useful

²⁸ Written submission of the U.S. League of Savings Associations to the Privacy Protection Study Commission, June 2, 1976.

for many purposes apart from banking, from marketing to law enforcement, will be considerably enhanced.²⁹

Expanding point-of-sale services will also have other less specialized effects. Even the most primitive point-of-sale services depend on accurate identification to assure that only authorized individuals have access to an account. Given the paramount importance of controlling access, providers of point-of-sale services will predictably demand more personal characteristics (e.g., fingerprints or characteristics of one's signature) to verify the identity of an account holder, giving financial record keepers additional information.

When banks and other financial institutions began issuing credit cards, the number of locations where their payment records originate and where copies of them must be kept multiplied.³⁰ Since most of the new makers and keepers of these records are not financial institutions, more and more of the records historically controlled by such institutions are now also retained and available for use by others. *This drift is significant insofar as one recognizes the existence of a confidential relationship between an individual and his bank and the obligation that flows to the record keeper as a result of the relationship. One public policy consequence is that identical records may be retained by different record keepers with whom an individual has different types of relationships and thus different expectations of confidentiality.*³¹

Very significant for personal privacy is that point-of-sale transactions must be monitored, and monitoring transactions could become an effective way of tracking an individual's movements.³² Large-scale credit-card systems already monitor frequency of card use and point-of-sale services extend the range of potential surveillance.

Finally, there will be a significant impact if ACH services become a

²⁹ The Bank Secrecy Act was passed explicitly recognizing that financial records would be used for nonfinancial purposes. In particular, the findings statement for Section 21(a)(1) reads: "The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigation proceedings. The Congress further finds that photocopies made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect."

³⁰ Unlike checks, which are governed by Articles 3 and 4 of the Uniform Commercial Code, credit-card transactions are governed by the Federal and State laws discussed in Chapter 2, and by contracts among card issuers and merchants. To get payment for purchases made with credit cards and to protect themselves against errors, merchants retain copies of credit-card transaction records.

³¹ The importance of recognizing an expectation of confidentiality as the touchstone for protecting the individual's interest in his records is discussed extensively in Chapter 1. Two recent California Supreme Court decisions, *Burrows v. Superior Court*, 13 Cal.3d 238 (1974) and *Valley Bank of Nevada v. Superior Court*, 15 Cal.3d 652 (1975) have upheld and clarified the theory that a bank customer has and should have a reasonable expectation of confidentiality and privacy in his bank records and, conversely, that a bank has a duty to take reasonable steps to preserve such confidentiality.

³² See James B. Rule, *Value Choices in Electronic Funds Transfer Policy*, prepared for the Office of Telecommunications Policy, Executive Office of the President, October 1975; also footnote 8.

major vehicle for processing transactions that originate in point-of-sale services.³³ As point-of-sale services penetrate different regional markets, the need for interregional exchange of data will arise just as did the need for interregional clearance of checks. Thus, the scope of ACH services could expand considerably, not only functionally, but also geographically to include a much greater share of individual transactions. Since such transactions are the raw material for piecing together personal profiles of individuals, ACH expansion into point-of-sale services would intensify the threat to personal privacy.

It should not be assumed, however, that extension of ACH services to include point-of-sale transactions is necessary for them to pose a threat to privacy. Even in the limited use for recurring payments, such as social security benefits or wages, an ACH service poses all three privacy problems inherent in a fully developed EFT environment: (1) its records include more personal details than traditional systems of payment transfer; (2) the information in its records is more centralized; and (3) it transfers more information than would ordinarily be considered payment data.

The first step in linking ACH services across regions has been initiated by the Federal Reserve district banks. Because the Board of Governors of the Federal Reserve System has not yet decided how far it will expand its provision of EFT services,³⁴ point-of-sale services under Federal Reserve System auspices must be considered a possibility. Indeed, this possibility is a central concern of the Commission.

RECOMMENDATIONS

The use of electronically recorded transactions for marketing is a well established practice of a variety of organizations, including retailers and financial institutions. Current market practice is to draw upon the vast pool of credit-card transactions and credit-bureau files, and more generalized sources of demographic information, such as census tracts. Point-of-sale services will dramatically expand the base of electronically recorded transactions that marketers can tap. It will not, however, create a new demand for such information; that demand already exists.

The disclosure of financial records to government agencies is another well established practice of the institutions that will provide or use EFT services. For savings and loan associations, point-of-sale services will create a new source of information for government agencies. For commercial banks, point-of-sale services reduce a major incentive to resist inquiries by government authorities because of the cost of searching microfilmed check records. Simply by changing the means of information storage and retrieval, point-of-sale services exacerbate the government-access problem which has existed long before the introduction of EFT.

³³ Comments of the Office of Telecommunications Policy before the Board of Governors of the Federal Reserve System, in the matter of Proposed Amendment of Regulation J, March, 1976.

³⁴ Letter from Arthur F. Burns, Chairman of the Board of Governors of the Federal Reserve System to the Privacy Protection Study Commission, November 1, 1976.

The practice of using point-of-sale services to locate an individual is not yet widespread, but already at least one nationwide independent check-guarantee service is deriving revenue from it.³⁵ If, for example, the wanted individual offers to pay by check at a store that subscribes to this authorization service, he is asked for his current address, which is promptly reported to the client who wants to locate him.

Marketing, law enforcement, and locator services are only a few of the many collateral uses for EFT records. The Commission's general recommendations with respect to depository relationships are designed to give an individual both access to and some control over the disclosure of information that an EFT environment would accumulate about him. However, the Commission also urges the adoption of the three recommendations immediately below as part of the overall regulation of electronic funds transfer services now being considered by legislatures and regulatory bodies at both the Federal and State level.

CENTRALIZED FINANCIAL INFORMATION FLOWS

The Commission recognizes that electronic funds transfer services inevitably create and retain some records which cannot be controlled by the institutions from which the individual can reasonably expect confidentiality. Institutional arrangements already formed for automated clearinghouses and shared point-of-sale systems introduce new sources of electronically recorded information that centralize, if only briefly, information otherwise segregated among diverse depository institutions. The Commission is concerned about the far-reaching consequences of these centralized financial information flows because of the scope of the records that is expected to develop and the manner in which information about individuals or groups of individuals may be accumulated on a selective basis.

Beyond the fundamental problem of the accumulation and centralization of detailed information, there are two additional threats that such an EFT environment raises. First, there is the well perceived one of electronic eavesdropping, though not necessarily at the relatively unsophisticated and illegitimate level of wiretapping. It is technically possible through electronic means to monitor the flow of information through an EFT network, and to capture items of interest on a selective basis. While this would require a sophisticated technical approach, it is nonetheless possible and could lead to a rapid-response capability for locating an individual, or to a capability for building a comprehensive record on an individual's movements, buying habits, and so forth. Equally important, it could be accomplished without surreptitious entry into the system by anyone given access to the computer facilities that sort and direct the flow of information.

The second privacy threat also arises from the fact that EFT services will require an extensive data communications network. While the detailed implementation of such a network may vary from one EFT application to another, each one must accumulate certain items of information about the traffic that flows through it. For accounting and billing purposes, as well as

³⁵ Written statement of Telecredit, Inc., Credit Reporting Hearings, August 5, 1976.

for controlling and operating a network, some portion of the information flowing through it must be retained within it. To illustrate, the telephone company automatically captures for all long distance connections the calling and called numbers, the duration of the call, and the time and date. Technically, the telephone network could also capture the voice conversation, but does not need to do so and in fact is prohibited by law from capturing it. In an EFT environment, however, this might not be so; for technical convenience a particular network design might capture everything that flowed through it.

Whether an EFT network captures all the information flowing through it or only certain items or even portions of items, there is a risk that the resulting pools of information will become attractive sources of personally identifiable information for use in ways inimical to personal privacy. Because the response time of present EFT systems is hours or days, the temptation to use them to surveil an individual's movements is minimal. A transaction-oriented EFT system, however, will be much more dynamic, and will have to respond in seconds if it is to fulfill its function. Thus, the temptation to surveil may increase markedly.

For these reasons, the Commission believes that protection must be afforded individually identifiable information flowing through an EFT data communications network. Accordingly, the Commission recommends:

Recommendation (9):

That individually identifiable account information generated in the provision of EFT services be retained only in the account records of the financial institutions and other parties to a transaction, except that it may be retained by the EFT service provider to the extent, and for the *limited period of time*, that such information is essential to fulfill the operational requirements of the service provider.

An EFT data network not only deals with the original details of a transaction, but also may add or derive additional items of information. For example, the time-of-day or a running transaction number may be added; patterns of credit-card usage or frequency of particular activity can be derived. The Commission intends that both primary transactional information and derivative information created by the operation of the data network be subject to the restrictions of *Recommendation (9)*. In essence, the Commission has concluded that information generated by an EFT system, like information which is the product of check or credit-card transactions today, should be available only from the parties to the transaction and, subject to the restrictions of appropriate expectations of confidentiality, from the financial institutions which maintain accounts for those parties. Further, the Commission seeks, through the measure suggested above, to limit the potential for misuse or improper disclosure of information by the service provider by eliminating the presence of identifiable information in the system (at the "switch," "clearinghouse," or other exchange point, for example) to the extent practicable.

ACCURACY OF ELECTRONIC TRANSACTIONS

How to assure the accuracy of recorded information and reduce untoward effects of inaccurately recorded transactions was discussed in Chapter 2. Individuals are legally protected by the Fair Credit Billing Act against some of the untoward consequences of credit-card errors. Although a point-of-sale service for making withdrawals is operationally similar to a credit-card system, the individual has no comparable legal protection when disputing the accuracy of an electronic transaction. Therefore, the Commission further recommends:

Recommendation (10):

That procedures be established so that an individual can promptly correct inaccuracies in transactions or account records generated by an EFT service.

GOVERNMENT OPERATION OF EFT SERVICES

EFT services will produce qualitative changes in the information base available to various institutions and, in turn, will affect the demands placed on those institutions for financial records. EFT therefore adds to the urgency of the need to strengthen protections for personal privacy in the manner advocated throughout this report. The Commission's concern with EFT as a threat to personal privacy goes beyond its effect on depository record keeping as dealt with in the preceding section of this chapter. The Commission sees governmental provision of EFT services as a dangerous direction.

The surveillance potential of an EFT system becomes much more formidable, in the Commission's estimation, if government operates the facilities than when the service is controlled by private parties. When any government entity processes financial records which document the private affairs of individuals, the likelihood and opportunities for other government agencies to obtain and possibly misuse those records increases. *Current problems with government access to bank records are minor compared with the potential threat to privacy posed by government operation of EFT facilities.* As such services become more sophisticated and documentation and surveillance capability increases, government operation of EFT systems will become, in the Commission's view, an unparalleled threat to personal privacy. The current paper-based clearing system, though largely operated by the Federal Reserve, is not a useful source of information for government agencies because the checks being cleared cannot easily be retrieved on a selective basis. The situation changes when the Federal Reserve uses telecommunications technology for processing private transactions. Commission staff learned in an interview with Federal Reserve officials that the Department of Justice, for example, has requested that the Federal Reserve supply it with information from records of transactions between private parties where the Federal Reserve employed telecommunications to effect the funds transfer. The IRS has a much more limited information resource

than the Federal Reserve would if it operated an EFT system; yet it has been abused for harassment and political advantage. While in our system of taxation there is a compelling need for government to manage the information flow on which the system depends, there seems to be no analogous rationale compelling government to provide EFT services for private parties.

A secondary problem focuses on the activities of the Federal Reserve Board of Governors and district banks. As mentioned above, the Federal Reserve has played a dominant role in the development of EFT, most notably by providing ACH services. For the Federal Reserve to continue, indeed increase, its control over facilities for EFT is unwise, in the Commission's view, particularly in view of the possible meshing of ACH services with point-of-sale services. Unless the Federal Reserve limits its EFT operations and begins divestment now, the inertia of economic circumstance may destroy the policy choice, leaving the Federal Reserve as the basic provider of services used by financial institutions to transfer funds and support point-of-sale services. Therefore, the Commission recommends:

Recommendation (11):

That no governmental entity be allowed to own, operate, or otherwise manage any part of an electronic payments mechanism that involves transactions among private parties.

The Commission's position does not suggest that there be no government regulation of EFT services. Without addressing such matters as the existing Federal regulatory structure for depository institutions, competition in the provision of EFT services, or the impact of an integrated national EFT system on capital markets, the Commission believes that regulation of the financial community should not be tied to government operation of an electronic payments system. If a monopolistic and thus closely regulated EFT system does emerge, the agencies which will have to provide oversight should not also operate its facilities.

Actual provision of services to a particular industry has often created unavoidable conflicts for the government agencies that act as that industry's watchmen or regulators. Too deep an involvement in day-to-day operation results either in a growing lack of responsiveness to consumer and public-policy concerns, or in a domination by the regulator which discourages efficiency and innovation, and fosters static patterns of response.³⁶ An example of the former problem can be found in the Interstate Commerce Commission's response to the congressional policy mandated by the Railroad Reform Act. The consequences of domination are reflected in the problems which recently spurred reform of the Atomic Energy Commission and the restructuring of U.S. nuclear research, development, and regulation.

In addition, given the communications aspect of EFT delivery systems, and the potential for them to evolve into more general information transfer services, the responsibility to regulate its development ought to be

³⁶ See Roger Noll, *Reforming Regulation*, (Washington, D.C.: Brookings Institution, 1972).

shared with the FCC or with a similar regulator who has communications as a principal mandate. From a privacy perspective, the traditional safeguards for individual messages transferred by way of electronic communications are the first step toward the protections needed in an EFT environment.

Finally, even if government operation of facilities for EFT services were determined to be desirable, the Federal Reserve Board and its related financial regulators are hardly the appropriate agencies to do it. Financial regulators such as the Federal Reserve are not as accountable to outside authorities as other governmental organizations; self-discipline is the only real restraint on their activities. An exception to the canons of governmental accountability to such external authorities as the Congress and the President may be justified insofar as Federal Reserve activities pertain to monetary policy and bank supervision, but hardly to activities which impinge on personal privacy.

Chapter 4

Mailing Lists

Each week the U.S. Postal Service delivers 2.3 pieces of unsolicited direct mail to the average American household.¹ To think of the flow and the impact of direct mail in terms of the average household, however, is misleading, since direct-mail users employ every stratagem money can buy to avoid sending their messages to an average house. The difference between profit and loss, between election and defeat, is skill in winnowing from a list of thousands or millions the names and addresses of the people most likely to buy a product, vote for a candidate, or contribute to a fund. Even a direct-mail campaign that starts with the advantage of a revolutionary product, a non-revolutionary candidate, or an appealing charitable cause must plan to break even on less than two percent positive response. It cannot realistically expect more, and is the object of wide imitation and envy if the response rate reaches five percent.

Even with a two percent average rate of return, however, direct-mail advertising is the major marketing tool of many enterprises. About \$4.6 billion are spent annually for the materials and postage, and the total volume of business generated through direct mail approaches \$60 billion.² More than 2.5 billion catalogs touting every conceivable type of goods are mailed each year, and an estimated \$10 billion a year of the sum Americans contribute to organized philanthropies is raised by direct mail.³ A good index of the importance of direct mail to the national economy is its standing among the competing advertising media: direct mail comes third, its users spending on it about half the total amount spent on newspaper advertising and about three-quarters of the total spent on televised promotions. After that come magazines and radio, each drawing about half as many dollars as direct mail.⁴

Section 5(c)(2)(B)(i) of the Privacy Act of 1974 directs the Commission to report to the President and the Congress on whether an organization engaged in interstate commerce should be required to remove from its

¹ Testimony of U.S. Postal Service, *Mailing Lists*, Hearings before the Privacy Protection Study Commission, (hereinafter cited as *Mailing Lists Hearings*), December 11, 1975, pp. 246-251.

² Testimony of Direct Mail Marketing Association (DMMA), *Mailing Lists Hearings*, (I) November 12, 1975, p. 6.

³ *Ibid.*, p. 7.

⁴ *Ibid.*, p. 6.

mailing list the name of an individual who does not want to have his name on it.⁵ This chapter answers the question, summarizes the findings of the Commission's study of the mailing-list industry, and presents the Commission's recommendations.

WHAT IS A MAILING LIST?

Strictly speaking, a mailing list is nothing more than a list of names and addresses used to prepare labels or envelopes for mailing. The names can come from almost anywhere: from public records like the telephone directory, newspapers, or State Motor Vehicle Registries; from private organization records like the customer files of a retailer or the donor files of a charity; from lists of people who respond to magazine and radio advertisements; from convention rosters and trade association directories; or from salesmen or friends.⁶ The key fact to understand about mailing lists, however, is that they are almost never free-standing; they are names and addresses of individuals who have some type of association, usually an active one, with a public or private organization. *To be on a mailing list, an individual's name must first find its way onto another list or into a record system that has been developed for some purpose other than mailing.* Indeed, once a mailing list, in the strict sense of the term, is disassociated from the master list or file it was culled from, its value rapidly declines because there is no longer any easy way to add new names to it or to correct or otherwise adjust the information in it.

WHO MAINTAINS A MAILING LIST?

Although there are list brokers who specialize in arranging rentals and exchanges of lists,⁷ the Commission's analysis leads to the conclusion that *the maintainer of a mailing list is the organization that keeps the records from which the mailing list is extracted*; that is, the organization that uses information in its own files to assemble, add to, or correct a mailing list. This definition includes credit grantors and credit bureaus that allow their files to be used to select names for someone else's mailing,⁸ and any organization that permits others to include their solicitations in its own customer mailings—for example, a credit grantor that allows a home appliance retailer to put an advertising flier in the envelope with the credit grantor's

⁵ Privacy Act of 1974, Pub. L. No. 93-579, §5(c)(2)(B)(i) (codified as a note to 5 U.S.C. 552a).

⁶ Testimony of the Reuben H. Donnelley Company, Mailing Lists Hearings, (II) November 12, 1975, pp. 5-6, 17-19; Testimony of R. L. Polk and Company, Mailing Lists Hearings, (I) November 12, 1975, pp. 113-114, 119, 121; Testimony of the Privacy Journal, Mailing List Hearings, December 10, 1975, p. 10.

⁷ Testimony of National Business Lists, Inc., Mailing Lists Hearings, (II) November 12, 1975, pp. 53, 54.

⁸ For a more detailed description of "pre-screening," see below.

monthly bill. The definition excludes list brokers, computer service bureaus,⁹ and other middlemen in direct-mailing operations.

The testimony of witnesses before the Commission suggested three categories of organizations that fit this definition of a list maintainer: public record compilers; private record compilers; and government agencies.

PUBLIC RECORD COMPILERS

An individual's name and address turn up in various places that make them public, for example, in city directories, membership lists, and newspapers and publications like *Who's Who*. For some list compilers, however, no public record is a more useful starting point than the telephone book. One major public record compiler collects every year the names and addresses of everyone in the country who has a published telephone number. In some cases, these telephone book lists are themselves used to develop mailing lists, but typically they are merged or crosschecked with information that other public record compilers have developed by purchasing or renting copies of the records in State and local government files.

The records of State and local government agencies give details on such things as the year, make, and model of the registered automobiles at a given address, or whether anyone at that address has a hunting or fishing license, owns property elsewhere in the area, or has registered to vote. From such details, a mailing-list user can draw quite useful inferences. How many and what kinds of cars an individual owns, for example, is one indication of the individual's income, rough perhaps, but useful to a list compiler.

Julian Haydon, Vice President and General Manager of R. L. Polk and Company, Inc., described how that major public record compiler develops its basic file:

We compile from official State records in 40 States¹⁰ a car owner list of 43,500,000 names; a truck owner's list of 11,400,000; a motorcycle owner's list of 2,600,000; and a monthly list of new car buyers averaging about 480,000. The information contained in the motor vehicle list is: *owner's name and address; year, model, make, series, body style and number of cylinders of vehicle; vehicle identification number* (used in safety recall programs); and *license plate number* (which is currently not used).

From this information, the following selection factors are developed: sex, inferred from the first name, *type of dwelling*, i.e., single or multiple, . . . inferred (from) the number of surnames found at a given address; *price class of car owned, based on year, model, make and series; current market value of the cars owned (CMV)*, based on

⁹ In a typical form of list rental or exchange, the list owner sends its list on tape to a service bureau which uses it to address envelopes for the user and then returns the tape to the list owner without the user even physically possessing it.

¹⁰ Testimony of R. L. Polk and Company, Mailing Lists Hearings, (I) November 12, 1975, pp. 121-22. At the time of the testimony there were 40, at this publication there are 36 states that permit motor vehicle records to be used in the manner described.

year, model, make and series (there are 10 CMV classifications). CMV "0" means that the car is rated to have an average value of less than \$150. CMV "1" is \$150 to \$349, and so on, up to CMV "9," with an estimated value of \$3,450 or more); *multiple car ownership*, based on two or more cars registered at the same name and address

....

From our city directories,¹¹ we develop the following information: *name of household head* (from this we infer sex); *spouse's name* (from this and occupation, we infer marital status); *address*; *telephone number*; *single or multiple dwelling*; *owner or renter*; *occupation of household head*; *number of children under 18*; *number of persons in the household*; *the year at which we first found the household at this address*; and *the year in which the dwelling first appeared in our canvass*.¹² [Emphasis supplied.]

The Reuben H. Donnelley Corporation, another major public record compiler, also described to the Commission how it assembles its mailing-list information on some 60 million American households:

We start with the compilation of a national list of approximately 52 million residence telephone subscribers. We buy all published telephone directories as input to this compilation. We compile *name and address*; *telephone number*; . . . *sex or title*, if available; . . . and, because of the technique of compilation, are able to include . . . *length of residence* for each name.

Separately we obtain from R. L. Polk and Co. . . . their national list of motor vehicle registrants. This currently includes approximately 45,000,000 automobile owners' names at residence address. As part of this record, we get *name*; *address*; *sex or title*, . . . *number of autos owned*; and, for the two most recent autos owned, *make*, *year*, *series*, *body style*, *price-class*, and *number of cylinders*. We then computer merge the telephone and auto lists in CDS (City Delivery Service) areas to produce the so-called Donnelley Quality Index, or DQI—an unduplicated list of approximately 60,000,000 households¹³ [Emphasis added.]

This 60 million-household list is then further refined through the use of census tract data. Although the Census Bureau never makes information public that would identify a specific individual or household, and although its statistical tables are never so fine-grained as to allow individual households to be identified, a public record compiler can get from Census Bureau tables enough data to characterize a geographic area as small as 275 housing units in terms of the median income, educational level, occupation-

¹¹ *Ibid.*, p. 122. From city directories, Polk compiles information on 27 million households.

¹² *Ibid.*, p. 123.

¹³ Testimony of Reuben H. Donnelly Company, Mailing Lists Hearings, (II) November 12, 1975, pp. 17-22.

al characteristics, median number of washing machines owned, and median number of children.¹⁴ Thus, Donnelley can break down its master file by matching up every name with its proper census tract, and then break it down further by tract characteristics such as median income, median number of large appliances per household, and the like.¹⁵

The amount of detailed information amassed by public record compilers like R. L. Polk and the Reuben H. Donnelley Corporation, and the variety of demographic descriptors they have developed for paring their lists, enable their clients to keep the cost of a mail campaign within profitable bounds. Mailing-list users do not want the entire Donnelley list of 60 million names and addresses. Each user wants only the names of people who fit its image of someone likely to respond to its particular message or appeal.¹⁶ Moreover, as one witness told the Commission:

. . . [T]hat type of list [the Donnelley and Polk list] is low man on the totem pole when it gets down to selling a product to a special market. For example, if I were the advertising manager of Black & Decker and had a new handy-dandy hand tool to sell, and I had a choice of the most sophisticated breakdown Donnelley could give me and the names of the most recent buyers of *The Popular Mechanics Home Handyman Encyclopedia*, I know where I'd start. I'd take the buyers.¹⁷

PRIVATE RECORD COMPILERS

The reason the advertising manager would take the buyers is simple: cost. No mailer can afford to waste postage on people who are not even going to look at what it sends them, and it would prefer not to waste postage on people who are probably not going to do whatever it is it wants them to do. According to spokesmen for the mail-marketing industry, the best predictor the mailer can go by is whether an individual has previously bought, joined, or donated by mail.¹⁸ The section below on selectivity gets back to this point.

¹⁴ *Ibid.*, pp. 19-22.

¹⁵ Donnelley described this process as follows: "After acquiring the tables made available by the Census Bureau of Census tracts and other geographic areas, including incidentally the block group and/or enumeration district mentioned earlier, which is a subdivision of the tract averaging about 275 housing units, the smallest entity with which we work, we process these tables according to our own requirements and now maintain a set of census tapes, as well as something we call our Geographic Statistical File. This latter file is a disc-stored set of approximately 42 census and list-descriptive statistics for each tract or smaller geographic entity. If, for example, we want to select all tracts with a median income of \$12,000 or more, and reporting a median of 3.5 persons per household or more, this file will produce a list of these tracts on tape. This tape can then be matched against our DQI list file, which has appropriate header indicators to identify all addresses by tract, to output all addresses on mailing labels that fall within the desired tracts." *Ibid.*

¹⁶ *Ibid.*, p. 12.

¹⁷ Testimony of Association of American Publishers, Mailing Lists Hearings, (II) November 12, 1975, pp. 84-5.

¹⁸ *Ibid.*, pp. 86-87; Testimony of Reuben H. Donnelley Corporation, Mailing Lists Hearings, (II) November 12, 1975, p. 5.

A few mailing-list compilers keep tabs on an individual's responses to direct-mail campaigns themselves, but the usual sources of information on who responds are the files of retailers (particularly those that sell by mail), and associations and charities. Not all such organizations rent or exchange the names and addresses of their customers, members, or donors. Major retailers that make sophisticated marketing uses of their own customer files do not allow them to be used by any other mailer,¹⁹ and there are organizations that rent lists from others but do not make their own files available to other mailers.²⁰ Prominent among the many that do rent, lend, or exchange the use of their lists are magazine publishers, mail-order and catalog sales companies, public-interest groups, political campaign organizations, and charities. Moreover, the fact that so many do underscores an important point. *One of the easiest ways for an individual to get his name on a lot of mailing lists is to respond to a direct-mail solicitation.* There are other ways, such as being named in a public record, or mailing back the subscription form inserted in a magazine purchased at a newstand, but responding to a solicitation received through the mail is the surest. That is something the people who complain about getting mountains of "junk mail" often do not understand. Chances are that the individual who is most inundated with unsolicited mail responds to some of it; if he did not, his name would not be in the customer, member, and donor files from which so many mailing lists derive.

GOVERNMENT AGENCY COMPILERS

When a firm like R. L. Polk acquires records from, say, a State motor vehicle registry, it is doing no more than any citizen could do. State public record statutes make many such records available for the cost of copying. Or a public record statute may require an agency to allow anyone who asks to do so to copy names and addresses from whatever lists it keeps for its own mailings. In some States and localities, it is also possible to purchase or copy ready-to-use mailing lists. Some State and local government agencies compile lists of names and addresses for the express purpose of selling them to direct-mail users. A government agency may offer for sale a list of all current holders of fishing licenses, for example, or of licensed barbers or plumbers.

The rules that affect the mailing-list practices of government agencies at all levels are among the murkier areas of public law. At the Federal level, for example, there are records and lists which must clearly be made available to any member of the public who asks for them, but the availability of many others to the public is uncertain. Under the Federal Freedom of Information Act, an agency may deny a request for the information it maintains about an identifiable individual if it can sustain its

¹⁹ Testimony of Sears, Roebuck and Company, *Credit-Card Issuers*, Hearings before the Privacy Protection Study Commission, February 12, 1976, p. 307.

²⁰ Testimony of Project HOPE, *Mailing Lists Hearings*, December 10, 1975, pp. 226-29.

opinion that to do otherwise would constitute a clearly unwarranted invasion of the individual's personal privacy.²¹ This provision of the law has spawned a number of court cases involving lists of names and addresses, or records that could easily be transformed into lists of names and addresses.

In one case the courts allowed a list of the names of those who participated in an election supervised by the National Labor Relations Board to be disclosed to a law professor who was doing research on such elections. [*Getman v. N.L.R.B.*, 450 F.2d 670 (D.C.Cir. 1971)] The Court of Appeals for the District of Columbia determined that the nature and importance of the research warranted this disclosure. A later decision involving the release of government information for the purposes of direct-mail solicitation went the other way. The Third Circuit Court of Appeals held that the government's release of the registration cards of persons making wine for personal consumption was not a disclosure required by the Freedom of Information Act. [*Wine Hobby U.S.A., Inc. v. IRS*, 502 F.2d 133 (3dCir. 1974)] The purpose—commercial mail advertising—did not justify invading the personal privacy of individual registrants by releasing their names and addresses.

Subsection (n) of the Privacy Act of 1974²² forbids a Federal agency to market mailing lists for profit but the Freedom of Information Act and other Federal statutes say that numerous Federal agency lists can be copied on request. For example, citizens-band (CB) radio licenses are, by Federal law, a matter of public record. Moreover, because CB licensees like to be able to find one another, the Federal Communications Commission makes a computer-accessible directory of their names, addresses, and frequencies available, for the cost of copying, and updates it biweekly. Anyone can get a copy of the directory from the National Technical Information Services (NTIS), a purveyor of government documents, and the NTIS will break the list down by geographic area. The purpose of all this is to enable the public to find out easily who the CB license holders are, but obviously the directory is also extremely useful to marketers of CB equipment.²³

The Privacy Act has had some effect on the availability of Federal agency records and lists that are or could be used by mailers. For example, the Drug Enforcement Agency now releases its lists of registered handlers of controlled substances only to requesters who guarantee in writing that they will not use them for any purpose other than to verify registration numbers, and refuses any request that smacks of intent to use the list for solicitation or commercial purposes.²⁴ The Department of the Interior has stopped public disclosure of most of its mailing lists; for example, it no longer discloses the names and addresses of retiring employees to retirement organizations.²⁵ The Veterans Administration releases its mailing lists only to nonprofit

²¹ 5 U.S.C. 552(b)(6).

²² 5 U.S.C. 552a(n).

²³ Privacy Commission staff conversation with John Small, Federal Communications Commission, October, 1976.

²⁴ Drug Enforcement Administration, Privacy Act of 1974 Annual Report to the Congress, Part III (f), p. 12, June 21, 1976.

²⁵ Annual Report of the Department of the Interior on the Privacy Act of 1974, Part III (f), *Sale or Rental of Mailing Lists*, p. 7, April 29, 1976.

organizations with functions directly related to the conduct of Veterans Administration programs or the utilization of benefits.²⁶ Other agencies, however, maintain lists of individuals with whom they have repeated contact. These may be project directors, business executives, college presidents, and the like, and there are lists of persons who ask to be included in their general mailings. These lists may be available at cost to anyone who asks for them, and the names of those who ask to be put on the general mailing list may sometimes be passed on to other government agencies for their use.²⁷

At the State level, 14 States²⁸ now restrict the use of motor vehicle registration information for commercial mailing purposes in one way or another. The restrictions are usually implemented either through Department of Motor Vehicle regulations or through contracts with list compilers. Under a restricted contract, a compiler like R. L. Polk can collect information from the registry of motor vehicle owners for statistical purposes but cannot use or rent it for commercial mailing. The one exception is that the information may be used for mailing safety and engine emission recall notifications to vehicle owners. Most of the other States consider the records of the motor vehicle registry public records just like all other public records (e.g., licenses and mortgages), and thus they may be used by public record compilers to create mailing lists.

HOW DOES A NAME PASS FROM LIST TO LIST?

The close connection between a mailing list and the source list or file from which it is drawn helps to explain an important feature of mailing-list development—the matter of list rental and exchange. As noted earlier, few mailing lists are ever completely severed from their source. Even public record compilers and government agencies regularly update their lists by checking them against the record systems they were taken from originally. Otherwise, the lists would soon be obsolete.

Many people seem to think that mailers get their names by copying them from the lists of other mailers. In fact, just the opposite is the case. List owners, by and large, do not permit their lists to be copied or even physically transferred to anyone else. What they do is make a rental or exchange agreement for the use of a list. The agreement usually expressly forbids copying it, and the other party seldom obtains physical possession of it. One of the two most common procedures is for the list owner to get the mailing envelopes and material from the renter and do the addressing and mailing itself. The other is for the list owner to give the list to a mailing house (often a computer service bureau) which then addresses and mails the promotional material given it by the renter, and returns the list to the owner. In neither

²⁶ Veterans Administration, Privacy Act of 1974, Annual Report for Calendar Year 1975, Part III (f), *Sale or Rental of Mailing Lists*, p. 4, April 30, 1976.

²⁷ National Science Foundation, Annual Report to Congress under the Privacy Act of 1974, Part III (f), *Sale or Rental of Mailing Lists*, April 22, 1976; see also United States Nuclear Regulatory Commission, Privacy Act Implementation Report, Part III (f), p. 8, April 30, 1976.

²⁸ Massachusetts, Washington, New Jersey, Hawaii, Nevada, Wyoming, Ohio, Connecticut, Pennsylvania, South Dakota, Missouri, Virginia, Alaska, and Arkansas.

case, however, is information about any individual on the list directly transferred from the files of the list owner to the files of the list user.²⁹

Consider the following example. John Smith is a customer of D. J. Higgenbottom, Inc., a mail-order marketer of gardening supplies; Smith's name is on Higgenbottom's mailing list for offers. One fall, Higgenbottom, Inc. rents the use of its own mailing list to Do-It-Yourself Industries, which has a new line of easy-to-assemble greenhouses. A mailing house does the addressing and mailing and Smith receives a direct-mail solicitation from Do-It-Yourself. A month later, Do-It-Yourself updates its own mailing list, adding to it the names and addresses of all its new customers, including Smith. Then, in November, the Woolly & Muffler Company, a purveyor of outdoor clothing, rents use of the Do-It-Yourself mailing list. Smith receives an ad from them, and purchases, say, a pair of fur-lined rubber boots, thereby getting his name added to Woolly & Muffler's customer file and eventually to its mailing list. When Tropical Tours, Inc., rents use of the Muffler list in December, Smith may break the chain by throwing its advertisement in the wastebasket, muttering wonderment as to how so many vendors get his name and address. In fact, the only one of them who knew Smith existed at first was Higgenbottom, Inc. Do-It-Yourself would never have known him if Smith had not filled in a Do-It-Yourself order blank, and so on down the chain to Tropical Tours, which still has no clue to Smith because he did not respond to its mailing.

That the individual is mainly responsible for the progress of his name from mailing list to mailing list is hard for most people to grasp, and mailing-list users do not go out of their way to enlighten them. By the time Smith tossed Tropical Tours' vacation package in the wastebasket, he was probably getting advertisements from all the other firms that had rented use of the Higgenbottom, Inc., Do-It-Yourself, or Woolly & Muffler lists, making him more concerned than ever about how his name seems to be bandied about.

WHO USES MAILING LISTS?

Traditionally, the small merchant with only a few items to sell has been the biggest user of rented lists. Even today, 200,000 of the 300,000 holders of third-class bulk-mail permits are companies doing less than half a million dollars worth of business annually.³⁰ Size, however, is no longer the characteristic that most clearly distinguishes the direct-mail user from other types of advertisers. As one witness before the Commission testified:

Our commercial clients and their purposes in renting our lists

²⁹ See, for example, the description of Project HOPE's direct-mail operations, Testimony of Project HOPE, Mailing Lists Hearings, December 10, 1975, pp. 226-27.

³⁰ Fewer than 30 of the nation's top 100 advertisers appear on the U.S. Postal Service list of its 6,000 top users of third-class mail. At a cost of 6.1 cents for each additional piece, direct-mail solicitation comes well within the budgets of many smaller businesses. Charitable and non-profit organizations operate under a Federal subsidy, paying only 1.8 cents to mail a message third-class. Testimony of Reuben H. Donnelley Company, Mailing Lists Hearings, (I) November 12, 1975, p. 7; Testimony of U.S. Postal Service, Mailing Lists Hearings, December 11, 1975, p. 268.

include magazine publishers to secure new subscribers; automobile companies to distribute new car catalogs and promotional pieces and to secure new credit accounts, make discount offers and secure new members in travel clubs; . . . insurance companies to sell insurance directly or to develop leads; retail stores to announce new stores, advertise sales, and secure credit accounts; charitable organizations to raise funds; research firms to determine consumer likes and dislikes about such things as automobile design, dealers and service; and package goods firms to distribute free samples or . . . discount coupons.³¹

Political and charitable organizations and public interest groups are also substantial users of direct mail. The Postal Service claims that in 1974, approximately \$20 billion, or 80 percent of all contributions to nonprofit charitable and public interest organizations were raised through activities in which direct mail played a role.³²

Government agencies are yet another user of mailing lists—their own and lists they rent from outside sources. One major government use of mailing lists is for sending out questionnaires to facilitate studies of various kinds.³³

Most small-business users of mailing lists use them for advertising rather than for selling, to invite a prospective customer to come into the store to buy something rather than to make a purchase by mail. A great deal of the mail addressed merely to "Occupant" is of this sort, and when a customer shows up the mailer has no way of knowing whether he came because of the mailed advertisement or just happened to be passing by. As subsequent sections of this chapter argue, the fact that so many mailing-list users are of the one-way variety is one of several justifications for holding the record keeper in whose files the name originates, rather than the users of lists derived from those files, responsible for removing a name from a list.

³¹ Testimony of R. L. Polk and Company, Mailing Lists Hearings, (I) November 12, 1974, p. 123.

³² Testimony of U.S. Postal Service, Mailing Lists Hearings, December 11, 1975, p. 249.

³³ Testimony of R. L. Polk and Company, Mailing Lists Hearings, (I) November 12, 1975, pp. 115-16. The Commission also heard testimony on FBI, IRS, and State police uses for purposes other than mailing. Among the examples offered were: when a make or model of car has to be identified in large numbers, the FBI asks R. L. Polk to "furnish the names and addresses of everyone who owns a 1965 Chevrolet Impala in a certain county, *Ibid.*, pp. 127, 141; a similar type of inquiry by the California Highway Patrol, *Ibid.*, p. 116; and unconsummated IRS negotiations with a major business list compiler for the purpose of identifying non-filers of tax returns, *Ibid.*, p. 116; Testimony of National Business Lists, Inc., Mailing Lists Hearings, (II) November 12, 1975, pp. 63-64, 70; Testimony of the U.S. Internal Revenue Service, Mailing Lists Hearings, December 11, 1975, pp. 310 ff. Properly speaking, however, these are not uses of mailing lists but rather of the underlying record systems from which mailing lists are developed. One public-record compiler testified that government agencies use its lists because "We have organized the information, standardized it, and have it readily available on magnetic tape. We control the computer and can cooperate quickly. In some States, the Department of Motor Vehicles has to get in line to use the computer or doesn't have the right programs." Testimony of R. L. Polk and Company, Mailing Lists Hearings, (I) November 12, 1975, pp. 146-47; Testimony of the Virginia Division of Motor Vehicles, Mailing Lists Hearings, December 10, 1975, pp. 163, 166. The issue of government access to private-sector record systems is dealt with in Chapter 9.

SELECTIVITY: THE KEY FACTOR

One reason that firms and organizations rent and exchange the use of their mailing lists is that they want to expand the number of people who buy through the mail. Joan Manley, a group vice president of Time, Inc. and head of its mail-order book division, told the Commission that it is good business for Time, Inc. to make its lists available for use by other direct mailers. Said Manley:

Our main reason for making them available is to enlarge the universe of active mail-order buyers. Our experience shows that the more one has purchased by mail, in the past, the more likely he is to appreciate the real value and the convenience of doing business by mail.³⁴

The main reason most mailers want to rent and exchange use of their lists, however, is that, given a choice, a direct-mail user would almost always prefer to send his messages to a selection of people who appear likely to respond to them, and for a large number of mailers that means to people who have a history of responding to direct-mail solicitations. Publishers Clearing House President, Louis Kislik, put it this way:

Publishers Clearing House predominantly sells magazine subscriptions by mail and we do it by sending mailing pieces to our own past customers and to people on other lists that we rent through the normal list rental procedure. The mailings are very large-scale During the course of the year I estimate that we reach something over 40 million households The outside lists that we get are predominantly lists of people who have taken a mail-order action. We find that they are very much more productive for us and that is of course the name of the game. That produces the most orders.³⁵

Richard Krieger, on behalf of the Association of American Publishers, summed it up even more bluntly:

. . . the best direct-mail campaign is the one that mails the least. This is a business necessity. In addition to rising costs generally, direct mailers are faced with quantum jump increases in postage. A piece of mail to an individual who doesn't want to buy is wasted, and to direct mailers the elimination of this kind of waste is absolutely essential.³⁶

The Reuben H. Donnelly testimony also emphasized the cost factor.

Assume that a publisher sponsors the mailing of a subscription offer. Typically, his current cost for the mailing list, printing,

³⁴ Testimony of Time, Inc., Mailing Lists Hearings, December 11, 1975, p. 350.

³⁵ Testimony of Publishers Clearing House, Mailing Lists Hearings, (I) November 12, 1975, pp. 99-100.

³⁶ Testimony of Association of American Publishers, Mailing Lists Hearings, (II) November 12, 1975, p. 87.

mailing services, and postage might approximate 12 cents per piece mailed. Assume an expected response of two percent as the result of mailing to all 60 million households on our list. This would result in a mailing cost of \$6 per subscription received. This might or might not be acceptable in terms of the publisher's economics. Assume, however, that some technique exists for selecting a more than averagely responsive subset of the mailing list, which, as the result of testing can be expected to return a three percent rather than a two percent rate. The immediate result is a decrease from \$6 to \$4 per subscription received.³⁷

There are many ways of selecting "a more than averagely responsive subset of the mailing list." One of the simplest methods is the demographic one used by the public record compilers. To illustrate from testimony before the Commission:

If one were promoting lawn care or gardening items, an immediate choice would be to mail to single-family housing units rather than apartments. While there is no guarantee that each single-family residence is an active gardener, and that apartment dwellers do not garden, experience and reason insist that the probability of success is materially increased by this selectivity.³⁸

Another method, equally simple, is to combine the names of people who have responded to several independent direct-mail solicitations into a single list and then pick out those that have responded most frequently. Typically, this kind of culling results in what is known among direct-mail users as a "hit list." Sometimes a list broker creates such a list as a way of promoting his particular line of business. What the broker does is get a group of list owners to agree to let him match their separate customer, member, or donor mailing lists to produce a single unduplicated list of "multiple buyers" which the broker then offers to other direct-mail users for a rental fee. For example, a list broker may get several companies in the mail-order nursery business to let him merge their customer lists into a single unduplicated list of people who have purchased nursery products two, three, or four times during the preceding year. Subject to conditions set by the list owners, and with the understanding that each owner will receive a pro-rata share of any proceeds from the rental of the new list, the broker then offers it to other direct-mail users. Owners and renters both benefit from this type of arrangement because, in addition to the rental fees that accrue to the list owners, each owner involved gets the use of an unduplicated list of people who have already demonstrated their responsiveness to direct-mail solicitations. Outside users of the hit list also benefit, since the customer responses to a mailing come back not to the broker or list owner, but to the user who then adds their names to its own list of customers.

The methods get more complicated when a list owner or user starts

³⁷ Testimony of Reuben H. Donnelley and Company, Mailing Lists Hearings, (II) November 12, 1975, p. 13.

³⁸ *Ibid.*, pp. 15-16.

combining demographic characteristics, such as median number of single-family households in a census tract or ZIP code area, with the "recency of response" criterion. The circulation manager for a popular monthly magazine testified of one such operation in which a small group of magazine publishers sends the names and addresses of their new subscribers to a public record compiler whose lists they use in their mass advertising campaigns. In return, the public record compiler sends each of them an evaluation of their subscribers broken down by demographic characteristics and recency of responses to mailings by the other members of the group. These reports do not identify individual subscribers, nor do they identify the other magazines a publisher's subscribers are also receiving. They do, however, give each publisher an idea of the demographic characteristics of its subscribers who also subscribe to other mass circulation magazines, so that the next time the publisher rents the use of one of the public record compiler's mass lists the publisher can rent names and addresses of only people with two important characteristics: (1) a propensity to subscribe to the publisher's own magazine, and (2) a propensity to respond to any mail advertisements for a mass circulation weekly or monthly of the sort marketed by that particular group of publishers.³⁹

A further refinement is introduced by what might be called a "multiple-response compiler." The multiple-response compiler is like the public record compiler in that it maintains a record system whose principal purpose is developing mailing lists for use by others. The specialty of the multiple-response compiler, however, is lists of people its own files show have responded to a variety of different types of direct-mail solicitations. The Richard A. Viguerie Co. of Falls Church, Virginia is a multiple-response compiler. The firm handles both political fund-raising solicitations and subscription campaigns that aim at people with conservative political views. Viguerie's firm, which maintains a master file of seven million names, sent out 65 million pieces of mail in 1975.⁴⁰

The Viguerie Company often handles all aspects of a mailer's solicitation: design, testing, mailing, and the actual receipt of replies.⁴¹ This last—receipt of the replies—allows the firm to keep track of the responses of the individuals whose names and addresses are in its master file. Viguerie described the operation as follows:

If it is a name that has responded to a mailing, we have the month and the year that they responded. And, of course, their name and address and ZIP code. We have the amount of their contribution, and many times, we have the source of where the name came from. In other words, if we rented a magazine list of businessmen, we have a notation that this is a person who is a businessman. So that he is

³⁹ Testimony of McCall Publishing Company, (II) November 12, 1975, pp. 109-120.

⁴⁰ Testimony of Richard A. Viguerie Company, Inc., Mailing Lists Hearings, December 10, 1975, p. 129.

⁴¹ *Ibid.*, pp. 117-120.

going to be interested in subscribing to business publications perhaps or some such as that.⁴²

The notation that "this is a person who is a businessman" results from coding the item to be returned by the recipient (such as a postcard or an order form) in a way that identifies the source of the list from which the individual's name originally came. Thus, if the Viguerie Company rents the use of a list from subscribers to a sporting magazine for use in marketing sporting equipment on behalf of one of its clients, it will put a code on the return order form which identifies the individual as a subscriber to the magazine. If the individual does not respond to the advertisement for sporting goods, his name will not get into the Viguerie files, but if he does, the Viguerie firm, through which his order will pass on its way to the sporting goods vendor, will note in its files the fact that he bought sporting goods *and* the fact that he subscribes to the magazine.

Because of the type of clients it has, the Viguerie files may also contain information on an individual's political opinions. The firm conducts surveys on behalf of political candidates, sometimes in conjunction with fund raising campaigns, and notes in its files how an individual responds. Said Viguerie in his testimony before the Commission:

. . . It is just very general, very basic information. You know, it is a half-dozen items: name and address of the person, along with Mr. or Mrs. or sex; the fact they contributed to client A. . . . If they say I can't send money today but I agree with your position, they are put into the file with that notation, also; and if they say "Go jump in the lake," we have got that in there, too. That is basically the information we have along with the amount—if they did send a contribution—we record the amount of contribution and the time they sent it.⁴³

This type of mailing-list compiler contrasts with the one described earlier that the small group of publishers uses because, as Viguerie testified, it is "mostly a record-keeping effort . . . to pinpoint special interests or philosophical inclinations."⁴⁴ Both, however, raise the same problem—namely, that the individuals who respond to advertisements or solicitations do not know that their actions are being noted in the files of a firm that specializes in developing mailing lists for use by others.

Selectivity is not only the key element in almost any direct mailing. Along with rising postal rates, it is also the principal force for change in the way mailing lists are developed. Chapter 2 refers to the fact that commercial banks, consumer-finance companies, and credit bureaus sometimes let their records on individuals be used to refine marketers' mailing lists by selecting from a large undifferentiated list the names of those with a propensity to buy certain kinds of items, or deleting the names of those who have unsatisfactory credit records and thus are undesirable prospects for a direct-mail

⁴² *Ibid.*, pp. 117-118.

⁴³ *Ibid.*, pp. 137-140.

⁴⁴ *Ibid.*, p. 137.

marketer. This type of selection, called "prescreening" when a credit bureau's files are used, has two consequences that are of interest here: first, an action of a consumer that has nothing to do with direct-mail operations may get him onto or off of a mailing list; second, confidential information about an individual in the files of a credit grantor, commercial bank, or credit bureau may be disclosed to a list user.

The Federal Trade Commission defines "prescreening" as:

the process by which a list of potential customers is submitted to a credit bureau which then audits the list by deletion of those names that have an adverse credit record.⁴⁵

Kenneth Larkin, Senior Vice President of the Bank of America, explained how one such operation works:

In accordance with the Federal Trade Commission's interpretation of the permissible uses of prescreening mechanisms, Bank of America . . . uses credit-reporting agencies for the purpose of expanding its card holder base. The Bank provides the credit-reporting agency with its credit criteria (i.e., annual income, number of open credit accounts, lack of experience with past due accounts, no BankAmericard account, . . .) and the credit-reporting agency matches the Bank's criteria against a name list containing desirable income characteristics . . . by various Federal census tracts for the State of California. By agreement, the credit-reporting agency submits to the Bank a list of those individuals who meet the Bank's criteria. The Bank, by letter, invites these persons to become BankAmericard holders by signing and returning the lower portion of the letter.⁴⁶

Larkin emphasized that Bank of America "does not open an account or send a credit card unless and until it receives a signed response from the invitee," and if a person receiving an invitation does not respond within 90 days, the Bank "makes no further use of the information." He added that if the invitee indicates that he does not wish to receive a credit card, the Bank so informs the credit bureau to assure that the individual will not again be invited to become a BankAmericard holder.⁴⁷

The example brings out two important points: one, to screen names on a public record list for a bank the credit bureau uses information about the individual's relationships with other credit grantors rather than information about their previous responsiveness to direct-mail campaigns; and two, the credit bureau actually sends the Bank the names and addresses on the screened list. In other words, there is a transfer of names and addresses from one organization to another of the names and addresses of individuals who have no role in the transfer and no knowledge of it. In the Bank of America case, the consequences for the individuals involved are no different than if

⁴⁵ 16 C.F.R. 600.5 Effective February 23, 1973, 38 *Federal Register* 4947.

⁴⁶ Testimony of Bank of America, Credit Cards and Reservations Systems Hearings, February 11, 1976, p. 30.

⁴⁷ *Ibid.*

the bank orders a credit report on them, but it is not hard to think of situations in which the consequences would be different.

Consider a simple example. Suppose a bank agreed to include a powerboat dealer's advertising brochure along with its monthly statements to individuals who have more than \$10,000 on deposit. If any one recipient of the brochure subsequently turns up at the dealership and displays the brochure, the dealer will immediately surmise something about the individual which could directly affect their bargaining, and, most importantly, which the individual no doubt thinks is a confidential item of information known only to himself and his bank.

This example is not as far-fetched as it may seem. If a retailer stuffs its monthly bills with advertising provided by an insurance company, the insurance company can safely assume that most of the individuals who respond to the stuffer have the general characteristics (such as average income, average number of dependents, average indebtedness) of the retailer's clientele. Moreover, if the retailer is willing, there is nothing to prevent the insurance company (or any other marketer, for that matter) from arranging to have the retailer stuff a highly selective subset of billings, perhaps the subset of those with incomes over \$20,000 who have purchased fancy accessories for their automobiles or whose purchases indicate that they like to travel. Any number of such parameters can be used to help target a mailing on a market likely to be receptive to it, but the individual whose name is bobbing around in all these transactions has no say in them at all. No doubt many of the individuals who receive the advertising messages that are sent using screening techniques are pleased to know about the products and services being offered and happy to be able to take advantage of them. Few realize, however, that in the process personal information about them may be disclosed to an organization before they make any move to establish a relationship with it.

To some extent, prescreening and the selection methods like it are nothing more than an embellishment on the way direct-mail marketing has always operated. It has always been possible for a list user to acquire details about respondents to its mailings. If a list user wants to know something additional about anyone who responds to one of its mailings, all it has to do is confine its mailing to the names on a list rented or borrowed from one particular source.

In the Higgenbottom, Inc. example, there were a number of opportunities for information about Smith's purchases to be transferred from firm to firm, and thus from mailing list to mailing list, without his knowledge. For instance, if Do-It-Yourself Industries had offered its list in segments, and the Wooly & Muffler Company had rented use of only the portion containing the names of recent purchasers of cold-weather gardening equipment, then when Smith responded to Wooly & Muffler's advertising campaign, Wooly & Muffler could have made the notation that Smith was a winter gardener. It would be a guess, but more likely than not an accurate one, and if correct, would have added an item of information about Smith to the Wooly & Muffler file without Smith's knowledge. As a practical matter, however, Wooly & Muffler would not have bothered to do so. Industry spokesmen

emphasized to the Commission that it would be uneconomic for a direct-mail marketer to take so much trouble unless the firm derived a substantial percentage of its income from the rental of its lists, or perhaps knew a number of mail-order houses that wanted to rent the use of a list of people who had recently purchased both cold-weather gardening equipment and a pair of fur-lined rubber boots.

The capacity to screen a list using the files of a credit grantor threatens to change this incentive structure, however, by making it possible for a mailer to rent the use of record systems that already contain a great deal of detail about an individual's purchasing behavior. Moreover, as Chapter 3 points out, electronic funds transfer technology promises to so increase the number of systems containing highly detailed records that the day may come when most mailing lists will be screened through them rather than by using the old-fashioned "recency of response" techniques. Such a development need not be viewed with alarm if the screening procedures block the disclosure of confidential information from one organization to another without the individual's consent. At present, however, there is no demand for attention to the problem screening procedures pose, since few individuals have any idea how mailing lists are developed, with or without screening, and even fewer know how to go about keeping their names and addresses from getting on lists they do not want to be on.

HOW TO KEEP A NAME OFF A MAILING LIST

If an individual does not want to receive unsolicited direct mail he can keep his name off most lists by becoming a modern-day hermit—by paying cash for all his purchases, not owning a car, giving to charities anonymously, always buying magazines at newsstands, never responding to a door-to-door survey, never signing a petition or a guest book, never registering to vote, and never attending a meeting, conference, or newsworthy social event. Even so he may still get a certain amount of unsolicited mail addressed to "Occupant," but not much because "Occupant" mailings are not selective enough for most mailers.

There are to be sure less anti-social ways for an individual to choke off his direct-mail traffic, provided he knows of them. The Commission learned of four others: an individual can send a personal letter of objection to every organization he suspects is renting or otherwise making his name available to direct mailers; he can exercise the "negative check-off option" that some organizations offer him; he can lodge his request not to receive mail with the Mail Preference Service, a centralized delisting program operated by the Direct Mail/Marketing Association; and he can use the delisting service the Post Office maintains for individuals who do not want to receive obscene advertising. What he must *not* do, if he wants his correspondence to have any effect, is write to the organization that sends him unsolicited mail without having first established a relationship with him, because, as explained earlier, the user of a list normally does not have his name until he responds to its advertisement or solicitation. Moreover, he must *not* ask that his name be *removed* from the mailing list, but rather that in the records used

to develop the mailing list a notation be put next to his name indicating that he does not want it to be used for direct-mail marketing or solicitation. That will assure that his name will be omitted from any list another organization is permitted to use.

DIRECT CORRESPONDENCE

If an individual believes a retailer, a magazine, or any other organization with which he has established a relationship, is making his name and address available for use by others in their direct-mail campaigns, he can write to the organization, asking that it put a notation in its records on him indicating that he does not want his name so used. Every organization that testified at the Commission's mailing list hearings, including the public record compilers, said that it would respond to such a request. The catch is that people do not know this opportunity is available to them, nor do they know which of the many organizations they have relationships with is renting, lending, or exchanging the use of their names.

THE NEGATIVE CHECK-OFF OPTION

The American Express Company and *Computerworld*, a weekly newspaper, both testified that they routinely inform their customers of their practice of making their customers' names and addresses available for mailing use by other organizations and give every customer an opportunity to object to having his name so used. The negative check-off is far more useful to individuals than the other three methods because the organizations offering it identify themselves to their customers as list renters and tell the individual exactly what to do if he objects to them renting his name to someone else. In the American Express case, moreover, the individual can also elect not to receive any advertising from American Express. It is easy for organizations that communicate with their customers at regular intervals in the normal course of their operations to offer the negative check off. American Express and *Computerworld* both renew their relationships with their customers annually and offer the check-off opportunity at that time. Not surprisingly, the negative check-off also seems to be more popular with customers, members, or donors who are already likely to be sensitive to the privacy issue. The percentage of *Computerworld* customers who exercise their negative check-off option, for example, is ten times greater than that of American Express customers.⁴⁸ Said the witness from American Express:

The program was started just about one year ago by notices that accompanied new and renewal American Express cards. The notice advised the recipients that they were subject to mailings by non-affiliated firms and that they had the option of having their names removed from these listings, as well as the listings we use for our own services and merchandise mailings.

⁴⁸ Testimony of American Express Company, Mailing Lists Hearings, (I) November 12, 1975, p. 68; Testimony of ComputerWorld, Mailing Lists Hearings, December 11, 1975, p. 406.

I would like to emphasize that in the past it had always been our policy to remove from our lists the names and addresses of any person who wrote to us requesting us to do so. Now for the first time we were advising them formally of this practice, and even giving them a vehicle to send back to us if they chose. The results of these mailings were both interesting and enlightening. Since November of 1974, we have sent out approximately 5.6 million notices and have received approximately 58 thousand written responses, just over one percent.

Of these responses about 40 percent or 23 thousand wished to continue receiving our own merchandise offerings but did not wish to receive offerings from non-affiliated companies. You may also be interested in the reasons given by a sample of those one percent who responded negatively. About 60 percent of them who asked for the removal of their names did so because they did not wish their names and addresses transferred to another.

Another 20 percent wanted removal because they felt it would help the postal system by stopping excess mail, thus resulting in reduced postage rates. An additional ten percent asked for removal because they did not wish to be tempted to purchase merchandise or in some instances to have their spouses tempted. An additional ten percent were miscellaneous reasons, difficult to categorize.⁴⁹

The offer of a negative check-off option may not reach all of an organization's customers, members, or donors. Many people have a well developed propensity not to read "junk mail," and so miss even the stuffer in an envelope that offers them a way of receiving less of it.⁵⁰ Publishers, mindful of the rule of thumb that a smart advertiser does not change the subject in the middle of a message, worried that the negative check-off message might distract the prospective customer from their advertising messages, although they had no persuasive evidence that the maxim applied in this case.⁵¹ This is of concern to publishers and other organizations whose mailings to customers, unlike those of American Express, always contain some kind of advertising or solicitation message. If the negative check-off message should prove detrimental to advertising and solicitation messages, these organizations would be reluctant to offer it, as they would then face a choice of weakening their promotion or making a special mailing at substantial extra cost. Public-interest groups argued for keeping the check-off procedure flexible. For them, the thank-you letters they send for donations received and their newsletters and annual reports appear to be the best vehicles to use in offering their members and donors the negative check-off option.

Public record compilers pointed out that because they have little direct

⁴⁹ Testimony of American Express Company, Mailing Lists Hearings, (I) November 12, 1975, p. 68.

⁵⁰ *Ibid.*, pp. 69-73.

⁵¹ *Ibid.*

contact with the public, their clients, the list users, would have to take the extra trouble of sending them the names of new list-user customers who indicate they do not want their names used for direct mailing. Even so, the customer request might not be fulfilled, since the public record compilers renew their basic files once a year and have no way of knowing that John Smith who lived at a certain address in Chicago last year is the same John Smith who lives this year in San Francisco. In other words, a notation next to Smith's name at the Chicago address does not get carried forward to the same Smith at a San Francisco address unless Smith tells the public record compiler he has moved. Smith, of course, cannot do that, because he does not know which public record compiler has his name and probably does not even know such organizations exist. Multiple-response compilers, which also have no direct communication with the individuals whose names are in their records, are in the same position.

The negative check-off in some form is nonetheless the most convenient method for the individual to use, and is not without benefit to the organization that offers it. American Express said that it offers the check-off "primarily for enhanced customer good will and improved customer relations," but added:

We believe that our program improves understanding and delays misconceptions regarding use of mailing lists, as well as providing easy recourse for that small percentage of consumers who wish to have their names removed from our lists. There are peripheral benefits, too; among others, reducing the costs of our own mailings and improving returns on direct-mail advertising. We have no regrets about our decision to institute this program and will be continuing it into the future . . .⁵²

THE MAIL PREFERENCE SERVICE

The cost of mailings may make most mailers sympathetic to any program that takes off the lists the names of people who do not want to be on them, but it is not always the most compelling consideration. If, for example, a list source has 24 million names for rent, picking out a tenth of one percent of them—24 thousand—can cost more than any resulting response rate would be worth. Nor is it easy to persuade proponents of the direct-mail medium that there really are people who cannot be coaxed into buying something by mail. Mailers want to keep the hardcore objectors off their lists,⁵³ but they do not want to lose anyone who might be turned into a prospect if they can only get the right message to him.⁵⁴ This pervasive bias in favor of keeping the messages flowing is reflected in the workings of the industry's centralized delisting operation—the Mail Preference Service (MPS).

The MPS works this way. Say Jones, who wants less unsolicited mail,

⁵² *Ibid.*, p. 69.

⁵³ *Ibid.*, p. 76.

⁵⁴ Testimony of Direct Mail/Marketing Association, Mailing Lists Hearings, (I) November 12, 1975, pp. 56-57.

learns of the MPS and writes to the Direct Mail/Marketing Association (DMMA) in New York to request a "Name Removal Form." By return mail he receives the form along with a pamphlet describing the MPS which paints the ramifications of his request for name-removal in tones that might cause anyone to have second thoughts. He is told, for example, that his action will probably cause him to "get fewer new product samples, coupons or special offers" and "receive fewer mailings offering chances to enter sweepstakes and other contests." Jones holds firm in his resolve to renounce such golden opportunities, and sends the completed form back to the DMMA. In case he had changed his mind, however, the DMMA also provided him with a form on which he could ask to have his name *added* to other mailing lists. Whichever step he takes, his name and address are put on computer tape and circulated on a regular basis to the 1,200 or so association members who participate in the MPS.

The MPS has been publicized during the last two years in national circulation magazines like *Time* and *Better Homes and Gardens*. Its advertisements are not the sort a direct-mail marketer trying to get customers would use, but a reader who perseveres will find out how the MPS works and the pros and cons of accepting its offer. One of the biggest disadvantages, and one that is shared by all four of the existing methods of curtailing the amount of direct mail an individual receives, is that the choice for the individual is strictly binary: he either does nothing, in which case he may be inundated with mail, or he takes advantage of one of the four methods open to him and gets little or no mail. MPS efforts to make the individual aware of that choice, so that his decision can be an informed one,⁵⁵ are apparently successful. At the time of the Commission's hearings, the DMMA had received requests from 135,137 individuals for the name-removal form. Of those, only about 56 thousand had filled out the form and sent it back; another 37,643 had asked for the add-on form, and 25 thousand of those had filled it out and sent it back.⁵⁶

In addition, the procedure for getting on the MPS lists is cumbersome. The individual must first write for a form, and when it comes, fill out and return it. The direct-mail marketers who testified before the Commission were quick to protest the prospect of any regulation that would require them to add extra steps to their original solicitations to customers, but the MPS adds steps that require the individual to persevere.

A simple, one-step procedure, perhaps using a form included as part of the MPS advertisements in mass circulation magazines, would no doubt generate a much bigger response. Moreover, the MPS form requires an individual to write his name and address only once and in a standardized format which may or may not be the way it appears on one mailing list or another. Hence, the probability that the MPS tape will serve to catch his name and address every time they appear on a list developed or used by a DMMA member is a product of many factors including how uniformly the individual signs his name, how often he changes his address, how accurately they are transcribed onto lists, and how sophisticated a matching program

⁵⁵ *Ibid.*, pp. 36-42; 54-57.

⁵⁶ *Ibid.*, p. 38.

the DMMA member has. Thus the best procedure would be one whereby an individual could send the MPS the address labels from his unsolicited mail so that his name and address could be put on the MPS master tape in all the variety that turns up in his mailbox. This was suggested to the Commission by a public record compiler for whom the MPS is the only practical conduit for receiving messages from individuals who do not want it to rent their names and address.⁵⁷

THE U.S. POSTAL SERVICE (USPS)

Two Federal statutes, one directed at pandering advertisements [39 U.S.C. 3008], and the other at sexually oriented advertising [39 U.S.C. 3010], provide ways for an individual to stop the flow of unsolicited mail from particular types of sources. The pandering advertisements statute allows an individual to get a court order forbidding a mailer to send him erotic material. Since the definition of "erotic" is left to the individual, an individual could perhaps use the statute to stop the flow of any kind of unsolicited mail from any source. However, anyone who tries to block the flow of material that nobody would consider erotic by this means must risk ridicule, since the proceeding to obtain the court order is a public one. USPS witnesses testified that as of the date of the Commission's hearings, it had received 475 thousand applications for court orders and logged approximately 6,000 violations.⁵⁸

The second statute, the so-called obscenity law, takes a different approach. It directs the USPS to maintain a list of individuals who do not want to receive a statutorily defined class of sexually oriented material, and forbids a mailer to send that class of material to anyone who has been on the USPS list more than 30 days. The statute also requires the mailer to put a notice on the outside of the mailed item indicating that it is classified as sexually oriented advertising. The enforcement provisions of this statute are currently being challenged on constitutional grounds.

As explained in Chapter 1, it appears that there are no constitutional barriers to having the USPS carry out the wishes of an individual who does not want to receive a particular type of mail so long as the individual alone makes the decision about what he will or will not receive. USPS witnesses, however, recommended against enlarging the USPS role in this regard. They pointed out that to do so would require a government agency to maintain still another file on individuals, and a file dealing with matters as sensitive as what an individual does not want to read at that.⁵⁹ The file, moreover, would have to be copied and distributed periodically to the 300 thousand-odd holders of third class bulk mail permits, and in order to assure accurate name matches, the USPS would probably have to require all direct mailers to use a standardized mailing label. Altogether, the administrative cost to

⁵⁷ Testimony of Reuben H. Donnelley and Company, Mailing Lists Hearings, (II) November 12, 1975, p. 43.

⁵⁸ Testimony of the U.S. Postal Service, Mailing Lists Hearings, December 11, 1975, p. 279.

⁵⁹ *Ibid.*, pp. 262-64.

the Postal Service would be close to intolerable, and the cost to mailers prohibitive.

RECOMMENDATIONS

The Commission was specifically directed to report to the President and the Congress on:

whether a person engaged in interstate commerce who maintains a mailing list should be required to remove an individual's name and address from such list upon request of that individual. [Section 5(c)(2)(B)(i) of P.L. 93-579]

After much deliberation the Commission concluded that the answer to this question should be "no." That is, the Commission recommends:

Recommendation (1):

That a person engaged in interstate commerce who maintains a mailing list should *not* be required by law to remove an individual's name and address from such a list upon request of that individual, except as already provided by law.

The Commission's principal reason for reaching this conclusion is that the balance that must be struck between the interests of individuals and the interests of mailers is an especially delicate one. As a public record compiler put it in a letter to the Commission:

The founders of this nation promoted a unified front against England through Committees of Correspondence. Since the beginning mail has been a vital element in promoting business and ideas.⁶⁰

Numerous witnesses testified to the importance of direct mail to non-profit organizations, to the champions of unpopular causes, and to many of the organizations that create diversity in American society.⁶¹ It was also pointed out the new Federal election law [2 U.S.C. 441a] makes candidates virtually dependent on the small contributions which direct mail campaigns are the only practical way to raise.⁶²

Dr. William B. Walsh, Director of Project Hope, testified that Project Hope's direct-mail program:

... is the most efficient method of reaching large numbers of individuals who may wish to support its work. Unlike commercial product manufacturers who can support vast advertising budgets

⁶⁰ Written statement of R. L. Polk and Company, Mailing Lists Hearings, (I) November 12, 1975, p. 22.

⁶¹ Testimony of Craver and Company, Mailing Lists Hearings, December 10, 1975, pp. 210-211, 218; Testimony of Richard A. Viguerie Company, Inc., Mailing Lists Hearings, December 10, 1975, p. 107; Testimony of Common Cause, Mailing Lists Hearings, December 10, 1975, pp. 44-45.

⁶² Testimony of Common Cause, Mailing Lists Hearings, December 10, 1975, pp. 46-47.

through the sales price of their product or service, Project Hope, as a non-profit institution, cannot afford major space advertising or radio and television campaigns. Project Hope uses direct mail to inform its present donors of program activity and progress and to locate new donors through the use of commercially available rented lists. The direct-mail program continues to be the largest single source of contributions to the Foundation. Through the use of rented lists, the prospect portion of the direct-mail program has enabled Hope to build a donor file of several hundred thousand individuals.⁶³

Industry representatives also emphasized the economic importance of direct mail, pointing out that 70 percent of all magazine subscriptions are sold by direct mail and, as noted earlier, that the total volume of business generated through direct mail approaches \$60 billion annually. While these figures are open to debate, there can be no doubt that direct-mail marketing has substantial economic significance.

Another reason for this recommendation is also largely economic. The Commission is persuaded that current technology cannot make a universal, legally enforceable name-flagging requirement economically feasible. The name-matching problem is a serious one, and any remedy proposed today would only create additional, and probably more serious, problems. It could, for example, necessitate a Federal regulation mandating a standard format of addressing all mail, not just direct mail. It could require the USPS to set up a data bank on individuals who do not want their names and addresses used for direct mailings. And if the costs of mailing continue to rise at anything like the present rate, organizations that now depend on direct mail for getting their messages will undoubtedly shift to telephone solicitation, a much greater nuisance to individuals than unsolicited mail.

Similarly, a statute requiring all organizations to offer a negative check-off option if they rent, lend, or exchange the names of their customers, members, or donors would have to reach further than appears at first blush. It would no doubt have to define the content of the offer precisely, require the offerer to make some acknowledgement that the individual's request has been received, and set a time limit for the organization's compliance. Such requirements demand uniformity where diversity is now the rule, and would greatly increase the cost burden of some organizations—public interest groups, for example—that can ill afford to bear it.

Focusing on the basic issue brings all these arguments into perspective. Strictly speaking, removing a name from a mailing list is *not* what one wants to accomplish. Rather, the basic mailing list issue is *whether an organization that maintains records on individuals and makes a practice of allowing other organizations to rent or borrow their names and addresses for use in direct-mail marketing or solicitation should have an obligation to notify the individuals that it does so and give each of them the opportunity to indicate that he does not want his name so used*. In general, the Commission believes that an individual should have a way to prevent information about him ostensibly collected for

⁶³ Testimony of Project HOPE, Mailing Lists Hearings, December 10, 1975, pp. 226-27.

one purpose from being used for another purpose to which he objects. The Commission did not go so far as to assert that an individual should have a unilateral right to control the uses to which recorded information about him is put. The individual's interest in controlling the use of recorded information about himself must be balanced against organizational and societal needs. In its examination of mailing-list operations, the Commission found that among the record-keeping organizations that maintain records about individuals with whom they have some direct relationship, it is a common practice to allow the individuals' names and addresses to be used by others without even telling the individuals that this is their practice. The Commission can find no overwhelming societal justification for such a state of affairs which, in effect, allows an organization complete discretion to decide whether and to whom it will rent or exchange its mailing lists.

Except for one,⁶⁴ none of the witnesses in the Commission's mailing list hearings were willing to acknowledge that privacy issues are involved in direct-mail marketing practices at all. Some were willing to admit that unsolicited mail could be a nuisance, an annoyance, or even an abomination—but not a trespass on personal privacy. If an individual does not wish to read his unsolicited mail, they argued, he has an easy option—throw it in the trashcan.⁶⁵ Even the USPS took this view. Robert Jordan, Director of its Office of Product Management, told the Commission:

We can find no evidence that the present use of mailing lists in the direct-marketing process constitutes a significant or peculiar invasion of privacy. The economic pressures of the marketplace provide mailers with a strong incentive to direct their advertisements away from those individuals who might find them annoying. By its very nature, direct mail must be aimed at individuals who have some desire to receive it. Moreover, the recipient of unwanted mail matter has the option of throwing it away. Indeed, an individual probably finds it easier to avoid reading his mail than to escape from any other form of advertising.⁶⁶

Many witnesses also argued that "good business practice" demands that organizations be responsive to their customers' wishes. No one wants a dissatisfied customer and no one wants to mail to an individual who is not going to be responsive.

The Commission would agree that *receipt* of mail is not the issue, but it also believes that the individual subject of a record has a stake in how that record is used as deserving of recognition as the record keeper's, and that therefore there should be close correspondence between his expectation of the uses that will be made of information about him and the uses that are actually made of it. In addition, there is, as explained earlier, the strong push for greater selectivity in the use of records about individuals to develop mailing lists. That drive, coupled with new technological capabilities, could

⁶⁴ Testimony of Privacy Journal, Mailing Lists Hearings, December 10, 1975, p. 8.

⁶⁵ Testimony of Time, Inc., Mailing Lists Hearings, December 11, 1975, pp. 343; Testimony of American Express Company, Mailing Lists Hearings (I), November 12, 1975, p. 65.

⁶⁶ Testimony of U.S. Postal Service, Mailing Lists Hearings, December 11, 1975, pp. 253-54.

change the character of the way direct-mail operations are conducted, a change even some of the witnesses agreed would be troubling.⁶⁷

In the chapters of this report which include recommendations for creating a legitimate, enforceable expectation of confidentiality for the individual⁶⁸ the Commission addresses the problems posed by the use of records containing confidential information to screen mailing lists. This is a basic recommendation which the Commission makes, with certain modifications, in every area for which it urges creation of a lawful expectation of confidentiality. The Commission, however, does not believe that the organizations which owe individuals a duty of confidentiality are the only ones that should adhere to the principle that information collected for one purpose may not be used for other purposes unless the individual is first notified and given a chance to protest. All organizations that keep records about individuals should adhere to it.

The organization representatives who testified before the Commission argued almost unanimously that established procedures are adequate for handling all problems related to the receipt of unsolicited direct mail. Even the USPS took this position, pointing out that postal regulations already protect against socially objectionable and fraudulent offers.⁶⁹ The Commission, however, disagrees. It finds existing procedures either too limited in their scope, too cumbersome, or too poorly understood to be effective. The individual is by and large ignorant of the side effects of ordering, joining, or contributing through the mails; and few of the organizations that seek his purchases or his support do much to enlighten him. As many of them testified, they stand ready to comply with the individual's wishes—if he can find them—but do not see it as any part of their obligation to tell him where to look for them.

On the other hand, the Commission is sensitive to the fear that regulation of current practice may destroy direct-mail operations, and to the argument that the potential it sees for serious, systematic abuse of mailing list practices is still largely no worse than a potential. There are many different ways an individual could be notified of list-rental and exchange practices. However, it is unlikely that any one method can be applied across the board without making it impossible for some direct-mail operations to function. Since the industry avowedly stands ready to experiment with various notice alternatives and, to respect the wishes of any customers, members, or donors who do not want to be on lists, the problem is to find effective, economically feasible ways for organizations to let the public know what their list rental and exchange policies are, and to notify individuals of any deviations; and for individuals who object to notify organizations of their objection. These are problems of method, not of principle, and only require organizations to assume responsibility for solving them.

⁶⁷ Testimony of Publishers Clearing House, Mailing Lists Hearings, November 12, 1975, pp. 91, 103; Testimony of ComputerWorld, Mailing Lists Hearings, December 11, 1975, pp. 430-31.

⁶⁸ Chapter 2 on the consumer-credit relationship; Chapter 3 on the depository relationship; and Chapters 5 and 7 on, respectively, the insurance and medical-care relationships.

⁶⁹ Testimony of U.S. Postal Service, Mailing Lists Hearings, December 11, 1975, p. 253.

The Commission believes that the record keeper with which the individual has a relationship should accept responsibility for notifying him and seeing that his objections, if any, are respected. However, because it is acutely aware of the difficulty and the undesirability of forcing record keepers to assume that responsibility, and because so many appear to be willing to assume it voluntarily, the Commission believes that voluntary implementation is likely to be as successful as well as adequate solution to the problem. Thus, the Commission recommends:

Recommendation (2):

That a private-sector organization which rents, sells, exchanges, or otherwise makes the addresses, or names and addresses, of its customers, members, or donors available to any other person for use in direct-mail marketing or solicitation, should adopt a procedure whereby each customer, member, or donor is informed of the organization's practice in that respect, including a description of the selection criteria that might be used in selling, renting or exchanging lists, such as ZIP codes, interest, buying patterns, and level of activity, and, in addition, is given an opportunity to indicate to the organization that he does not wish to have his address, or name and address, made available for such purposes. Further, when a private-sector organization is informed by one of its customers, members, or donors that he does not want his address, or name and address, made available to another person for use in direct-mail marketing or solicitation, the organization should promptly take whatever steps are necessary to assure that the name and address is not so used, including notifying a multiple-response compiler or a credit bureau to whom the name and address has been disclosed with the prospect that it may be used to screen or otherwise prepare lists of names and addresses for use in direct-mail marketing or solicitation.

The Commission considered the binary nature of all the current delisting methods and concluded that if the individual is to have a fair basis for deciding whether he wants to ask that his name not be used, organizations will have to include in the recommended notices the selection criteria they allow to be used in developing mailing lists from their records. An individual may have no objection, for example, to having his name rented as a donor to a particular charity, in principle, but might still object to being put on a list of donors who contribute more than \$500 a year.

Since some of the record systems used to develop or screen mailing lists today are maintained by organizations that have no direct contact with the individuals whose names and addresses are in their files, the Commission also recommends that a record keeper notify any multiple-response compiler or credit bureau to which it discloses its list information of the objections it receives from individuals. The Bank of America testimony on prescreening illustrates how easy it is to notify a credit bureau, and those who employ a multiple-response compiler to do their mailings should be able to handle the notification task equally simply.

The fit between this recommendation and the confidentiality recommendations in other chapters should be noted. Those recommendations generally call for some kind of advance notice of the kinds of disclosures the record keeper expects to make without asking for the individual's authorization. *Recommendation (2)*, above, is intended to supplement such requirements; not to supplant them. Thus, a credit grantor, insurer, or depository institution that owes a duty of confidentiality to the individuals on whom it maintains records would be legally required to include in its initial notice the disclosures it normally makes for marketing purposes, but its compliance with *Recommendation (2)*, above, would otherwise be voluntary.

A word also needs to be said about the meaning of "organization" as the term is used in *Recommendation (2)*. The recommendation does *not* contemplate the free exchange of names and addresses between a private-sector organization's subsidiaries and affiliates. As emphasized in Chapter 1, the Commission believes that regardless of the level at which an organization is defined as a unit for the purpose of complying with the Commission's several sets of recommendations, an individual must be assured that information about him collected and maintained in connection with one record-keeping relationship will not be made available for use in connection with another. If two affiliated companies define themselves as a unit but perform two different functions—one extending credit and the other selling insurance, for example—information about customers must not flow between them without adherence to the notice, authorization, and other requirements called for in the Commission's recommendations. Likewise, a corporate affiliate in, say, the retailing business should not rent or lend the names and addresses of its customers to another affiliate to market insurance unless the retailer informs its customers that it intends to do so and gives them an opportunity to indicate that they do not want their names used for that purpose.

GOVERNMENT AGENCY RECORDS

The records on individuals maintained by State and local government agencies are the principle source of the information public record compilers use to develop mailing lists. Unlike a multiple-response compiler, the public record compiler is not well situated to receive and take account of an individual's objection notices forwarded to it by its client organizations. The public record compiler renews its record system annually, and has no way of knowing whether John Smith in San Francisco this year is the same John Smith who last year in Chicago asked one of the compiler's clients to see that the compiler noted his objection to unsolicited mail. Furthermore, unless a public record compiler does its clients' mailings for them, it will not have control over the form individuals' responses take and thus may not be able to match the name and address on an objection notice with any name and address in its files. The name-matching problem can be particularly acute for a public record compiler.

The Commission considered several different ways of informing a public record compiler that an individual does not want his name on lists.

One is to have the public record compiler send a notice to each individual named in its records, but this would be inordinately costly. Another is to have each State and local government agency offer a negative check-off option to individuals whose names appear in its public records. This would run afoul of the objectives of public-record statutes, since it would require an agency to distinguish between an individual acting as a public record compiler's representative and the same individual asking for information in his capacity as a private citizen. An agency can make such a distinction when it enters into a contract with a public record compiler, but it otherwise can be difficult both to make and to justify. Moreover, to have the negative check-off apply to all public requests for access to a record, so as to avoid having to distinguish between different types of requestors, would even further undermine the purpose of public-record statutes.

Fortunately there is an alternative which takes account of the compiler's and its clients' desire for selectivity. The Commission concluded that if it is possible to rely on the mailing list user's much stressed desire not to send messages to individuals who do not want to receive them, it should be enough to note next to an individual's name on a public record that he does not want his name used for marketing or solicitation. The public record compiler would still be able to copy the record, just as any other member of the public can, but it would be on notice that the individual had objected to having his name on a list, and presumably, for economic reasons, would not include that name on lists it develops for its clients.

Accordingly, the Commission recommends:

Recommendation (3):

That each State review the direct-mail marketing and solicitation uses that are made of State agency records about individuals and for those that are used for such purposes, direct the State agency maintaining them to devise a procedure whereby an individual can inform the agency that he does not want a record pertaining to himself to be used for such purposes and have that fact noted in the record in a manner that will assure that the individual's preference will be communicated to any user of the record for direct-mail marketing or solicitation. Special attention should be paid to Department of Motor Vehicle records and the practices of agencies who prepare mailing lists for the express purpose of selling, renting or exchanging them with others.

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The Commission believes that the recommendations in this chapter will significantly contribute to dispelling public ignorance of, and concern about, how individuals' names get onto and off of mailing lists. The individual who wants to receive no mail at all will not be satisfied. Even if every organization in the country complied, he would still get some mail addressed to "Occupant." The Commission, however, does not believe that

the mere receipt of mail is the problem. Finding out "how they got my name" is the problem and the Commission believes it has found the way to let the individual know.